THIS BOOK
MUST NOT BE REMOVED
FROM THE LIBRARY

UNIVERSITY OF LONDON LIBRARY

REFERENCE ONLY

HUBERT WOOD, LONDON

REFERENCE ONLY

346.4
Mx. North Gall.

Digitized by the Internet Archive
in 2026

https://archive.org/details/law-reports-chancery-division_1904_2

THE

INCORPORATED COUNCIL OF LAW REPORTING

FOR

ENGLAND AND WALES.

Members of the Council.

Chairman—C. M. WARMINGTON, Esq., K.C.
Vice-Chairman—F. A. BOSANQUET, Esq., K.C.

EX-OFFICIO MEMBERS.

SIR ROBERT B. FINLAY, G.C.M.G., M.P. .	ATTORNEY-GENERAL.
THE RIGHT HON. SIR EDWARD H. CARSON, Knt., M.P.	SOLICITOR-GENERAL.

THOMAS RAWLE, Esq., President of the Law Society.

ELECTED MEMBERS.

P. OGDEN LAWRENCE, Esq., K.C. A. R. KIRBY, Esq.	Lincoln's Inn.
F. A. BOSANQUET, Esq., K.C. W. PICKFORD, Esq., K.C.	Inner Temple.
C. M. WARMINGTON, Esq., K.C. C. C. SCOTT, Esq.	Middle Temple.
JAMES MULLIGAN, Esq., K.C. J. C. LEWIS COWARD, Esq., K.C.	Gray's Inn.
W. ENGLISH HARRISON, Esq., K.C., of the Middle Temple. ROBERT F. NORTON, Esq., K.C., of Lincoln's Inn.	Appointed by the Council of Law Reporting on the nomination of the General Council of the Bar.
SIR JOHN HOLLAMS, Knt. (Firm—Messrs. Hollams, Sons, Coward & Hawksley), 30, Mincing Lane, E.C. E. J. BRISTOW, Esq. (Firm—Messrs. Wilson, Bristows & Carpmael), 1, Copthall Buildings, E.C.	The Law Society.

Secretary—P. NOBLE FAWCETT, Esq., 10, Old Square, Lincoln's Inn, London, W.C.

1904.

THE

LAW REPORTS

OF THE INCORPORATED COUNCIL OF LAW REPORTING.

Supreme Court of Judicature.

CASES DETERMINED IN THE

CHANCERY DIVISION

AND IN

LUNACY,

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

EDITOR—SIR FREDERICK POLLOCK, BART., *Barrister-at-Law.*
ASSISTANT EDITOR—A. P. STONE, *Barrister-at-Law.*

REPORTERS.

Court of Appeal	G. I. FOSTER COOKE, W. LLOYD CABELL,	*Barristers-at-Law.*
Mr. Justice Kekewich AND Mr. Justice Joyce	C. C. M. DALE, G. A. STREETEN, H. B. HEMMING,	*Barristers-at-Law.*
Mr. Justice Farwell AND Mr. Justice Swinfen Eady	H. L. FRASER, G. R. ALSTON, J. R. BROOKE,	*Barristers-at-Law.*
Mr. Justice Buckley AND Mr. Justice Warrington	W. COWELL DAVIES, FRANK EVANS, H. C. ROPER,	*Barristers-at-Law.*

1904.—VOL. II.

LONDON:
Printed and Published for the Council of Law Reporting
BY WILLIAM CLOWES AND SONS, LIMITED,
DUKE STREET, STAMFORD STREET, S.E., AND GREAT WINDMILL STREET, W.
PUBLISHING OFFICE, 7, FLEET STREET, E.C.

BIBL. LONDIN UNIV.

Earl of Halsbury	*Lord Chancellor.*
Lord Alverstone	*Lord Chief Justice of England.*
Sir Richard Henn Collins	*Master of the Rolls.*
Sir Francis Henry Jeune	*President of the Probate, Divorce, and Admiralty Division.*
Sir Roland Vaughan Williams	*Lords Justices of the Court of Appeal.*
Sir Robert Romer	
Sir James Stirling	
Sir James Charles Mathew	
Sir H. H. Cozens-Hardy	
Sir Arthur Kekewich	*Justices of High Court, attached to Chancery Division.*
Sir George Farwell	
Sir H. B. Buckley	
Sir Matthew I. Joyce	
Sir C. Swinfen Eady	
Sir T. Rolls Warrington	
Sir Robert B. Finlay	*Attorney-General.*
Sir Edward H. Carson	*Solicitor-General.*

The Mode of Citation of the Volumes of the *Law Reports*, commencing January 1, 1904, will be as follows:—

In the First Series,
[1904] 1 Ch. [1904] 2 Ch.

In the Second Series,
[1904] 1 K. B. [1904] 2 K. B. [1904] P.

In the Third Series,
[1904] A. C.

A TABLE

OF THE

NAMES OF THE CASES REPORTED

IN THIS VOLUME.

A.

PAGE

A., *In re* – – (C.A.) 328
Allen and Driscoll's Contract, *In re* – – (C.A.) 226
Andrews *v.* Brown & Gregory, Ld. Shepheard *v.* Brown & Gregory, Ld. *In re* Brown & Gregory, Ld. – (C.A.) 448
Ashton Gas Company, Attorney-General *v.* – – (C.A.) 621
Atkinson, *In re.* Barbers' Company *v.* Grose-Smith (C.A.) 160
Attorney-General *v.* Ashton Gas Company – – (C.A.) 621
———, Laurie *v.* *In re* Church Patronage Trust (C.A.) 643
——— *v.* National Hospital for the Relief and Cure of the Paralysed and Epileptic – – – – 252
Attorney-General *v.* Wimbledon House Estate Company – 34
Awdry *v.* Cayley. *In re* Cayley 781

B.

Bank of England, Oldham Corporation *v.* – – (C.A.) 716
Barbers' Company *v.* Grose-Smith. *In re* Atkinson (C.A.) 160
Barrow, Dickinson *v.* – – 339
Barry Urban Council, Milward *v.* 481
Battie-Wrightson *v.* Thomas. *In re* Wrightson – (C.A.) 95
Best, *In re.* Jarvis *v.* Birmingham Corporation – – 354
Birmingham Corporation, Jarvis *v.* *In re* Best – – – 354
Bishop Auckland Industrial Co-operative Society *v.* Butterknowle Colliery Company (C.A.) 419

	PAGE
Blunt's Trusts, *In re.* Wigan *v.* Clinch – – – – –	767
Bolton Estates Act, 1863, *In re*	289
Boots, Cash Chemists (Southern), Ld., Harris *v.* – – –	376
Bowden's (E. M.) Patents Syndicate, Ld. *v.* Herbert Smith & Co. – – – – –	86
———————— (C.A.)	122
Bowlby, *In re.* Bowlby *v.* Bowlby – – (C.A.)	685
——— *v.* Bowlby. *In re* Bowlby (C.A.)	685
Brinckman *v.* Matley (C.A.)	313
Brown & Gregory, Ld., *In re.* Shepheard *v.* Brown & Gregory, Ld. Andrews *v.* Brown & Gregory, Ld. – (C.A.)	448
————————, Andrews *v.* Shepheard *v.* Brown & Gregory, Ld. *In re* Brown & Gregory, Ld. – (C.A.)	448
Butterknowle Colliery Company, Bishop Auckland Industrial Co-operative Society *v.* (C.A.)	419

C.

Cattley *v.* West. *In re* Linsley	785
Cayley, *In re.* Awdry *v.* Cayley	781
———, Awdry *v.* *In re* Cayley	781
Church Patronage Trust, *In re.* Laurie *v.* Attorney-General (C.A.)	643
Clabbon, *In re* – – –	465
Clarke and Poole's Contract, *In re* – – – (C.A.)	173
Clifton's Patent, *In re* – –	357
Clinch, Wigan *v.* *In re* Blunt's Trusts – – – –	767
Courtney, Pease *v.* – – –	503

D.

Dallas, *In re* – – (C.A.)	385
David Payne & Co., Ld., *In re.* Young *v.* David Payne & Co., Ld. – – – (C.A.)	608
————————, Young *v.* *In re* David Payne & Co., Ld. – – – (C.A.)	608
Dayrell, *In re.* Hastie *v.* Dayrell – – – – –	496
———, Hastie *v.* *In re* Dayrell	496
Denne, Mercer *v.* – – –	534
Denton, Licenses Insurance Corporation and Guarantee Fund, Ld. *v.* *In re* Denton's Estate (C.A.)	178
Denton's Estate, *In re.* Licenses Insurance Corporation and Guarantee Fund, Ld. *v.* Denton (C.A.)	178
Dickinson *v.* Barrow – –	339
Dowson and Jenkins's Contract, *In re* – – – (C.A.)	219
Driscoll and Allen's Contract, *In re* – – – (C.A.)	226

F.

Farnham's Settlement, *In re.* Law Union and Crown Insurance Company *v.* Hartopp (C.A.)	561
Fowler, Ridout *v.* – (C.A.)	93
Fulham Guardians, Sharpington *v.* – – – – –	449

G.

Gabellini *v.* Woods. *In re* Woods – – – –	4
Gamage (A. W.), Ld., Werner Motors, Ld. *v.* – (C.A.)	580
George Routledge & Sons, Ld., *In re.* Hummel *v.* George Routledge & Sons, Ld. – –	474
————————, Hummel *v.* *In re* George Routledge & Sons, Ld. – –	474
Gerard *v.* Stafford. *In re* Lord Stafford's Settlement and Will	72
Goddard, Robins *v.* – –	261
Greenhill, Tringham *v.* *In re* Tringham's Trusts – –	487
Grose-Smith, Barbers' Company *v.* *In re* Atkinson (C.A.)	160

H.

Hankinson *v.* Hayter. *In re* Wheeler – – – –	66

PAGE

Harris *v.* Boots, Cash Chemists (Southern), Ld. – – – 376
Hartopp, Law Union and Crown Insurance Company *v.* *In re* Farnham's Settlement (C.A.) 561
Hastie *v.* Dayrell. *In re* Dayrell 496
Hayter, Hankinson *v.* *In re* Wheeler – – – – 66
Hazeldine, Ray *v.* – – – 17
Herbert Smith & Co., E. M. Bowden's Patents Syndicate, Ld. *v.* – – – – 86
———————(C.A.) 122
Hertfordshire County Council *v.* New River Company – – 513
Hoare & Co., Ld. and Reduced, *In re* – – (C.A.) 208
Hodgson, Sharpe *v.* *In re* Pimm 345
Hoole *v.* Speak – – – 732
Hummel *v.* George Routledge & Sons, Ld. *In re* George Routledge & Sons, Ld. – – 474

I.

Ingram, Lindon *v.* *In re* Venn 52
Irwin, *In re.* Irwin *v.* Parkes – 752
——— *v.* Parkes. *In re* Irwin – 752

J.

J. P. Trust, Ld. *v.* Johnston Foreign Patents Company (C.A.) 234
Jarvis *v.* Birmingham Corporation. *In re* Best – – 354
Jenkins and Dowson's Contract, *In re* – – – (C.A.) 219
Johnston Die Press Company, *In re.* J. P. Trust, Ld. *v.* The Same – – – (C.A.) 234
Johnston Foreign Patents Company, *In re.* J. P. Trust, Ld. *v.* The Same – (C.A.) 234
Johnstonia Engraving Company, *In re.* J. P. Trust, Ld. *v.* The Same – – – (C.A.) 234
Jones and Everett, *In re* – – 363
Joseph Crosfield & Sons, Ld. *v.* Manchester Ship Canal Company – – – (C.A.) 123

K.

PAGE

Keck's Settlement, *In re* – – 22
King, Stevens *v.* – – – 30
Koffyfontein Mines, Ld., Mosely *v.* – – – (C.A.) 108

L.

Laurie *v.* Attorney-General. *In re* Church Patronage Trust (C.A.) 643
Law Guarantee and Trust Society, Smith *v.* – – (C.A.) 569
Law Union and Crown Insurance Company *v.* Hartopp. *In re* Farnham's Settlement (C.A.) 561
Lea *v.* Thursby – – – 57
Lead Company's Workmen's Fund Society, *In re.* Lowes *v.* Governor and Company for Smelting down Lead with Pit and Sea Coal – – – 196
Leeds and Hanley Theatres of Varieties, Ld., *In re* – – 45
Lewis, *In re.* Lewis *v.* Lewis (C.A.) 656
——— *v.* Lewis. *In re* Lewis (C.A.) 656
Licenses Insurance Corporation and Guarantee Fund, Ld. *v.* Denton. *In re* Denton's Estate – – – (C.A.) 178
Lindon *v.* Ingram. *In re* Venn 52
Linsley, *In re.* Cattley *v.* West 785
Longbotham & Sons, *In re* (C.A.) 152
Lowes *v.* Governor and Company for Smelting down Lead with Pit and Sea Coal. *In re* Lead Company's Workmen's Fund Society – – – – 196

M.

McGruther *v.* Pitcher (C.A.) 306
MacLeay, Tait *v.* – (C.A.) 631
Manchester Ship Canal Company, Joseph Crosfield & Sons, Ld. *v.* (C.A.) 123
Manners *v.* St. David's Gold and Copper Mines, Ld. (C.A.) 593

PAGE

Massey, Spark *v.* *In re* Spark's Trusts – – (C.A.) 121
Matley, Brinckman *v.* (C.A.) 313
Mellor *v.* Walmesley – – 525
Mercer *v.* Denne – – – 534
Milnes, Phillimore *v.* *In re* Phillimore's Estate – – 460
Milward *v.* Barry Urban Council 481
Moore, Porter *v.* – – – 367
Mosely *v.* Koffyfontein Mines, Ld. – – – (C.A.) 108

N.

National Hospital for the Relief and Cure of the Paralysed and Epileptic, Attorney-General *v.* 252
New River Company, Hertfordshire County Council *v.* – 513
New Sharlston Collieries Company *v.* Westmorland (Earl of) (H.L.) 443, n.
North American Land and Timber Company *v.* Watkins (C.A.) 233

O.

Oldham Corporation *v.* Bank of England – – (C.A.) 716

P.

Palmer's Decoration and Furnishing Company, *In re* – 743
Parkes, Irwin *v.* *In re* Irwin – 752
Pease *v.* Courtney – – – 503
Phillimore *v.* Milnes. *In re* Phillimore's Estate – – 460
Phillimore's Estate, *In re.* Phillimore *v.* Milnes – – – 460
Pimm, *In re.* Sharpe *v.* Hodgson 345
Pitcher, McGruther *v.* (C.A.) 306
Poole and Clarke's Contract, *In re* – – – (C.A.) 173
Porter *v.* Moore – – – 367
Pretoria Pietersburg Railway Company, *In re* – (C.A.) 170
——————— (No. 2) 359

R.

Randt Gold Mining Company, *In re* – – – – 468

PAGE

Ray *v.* Hazeldine – – – 17
Richardson, *In re.* Richardson *v.* Richardson – – – 777
——————— *v.* Richardson. *In re* Richardson – – – 777
Ridley, *In re.* Ridley *v.* Ridley 774
——— *v.* Ridley. *In re* Ridley 774
Ridout *v.* Fowler – (C.A.) 93
Robins *v.* Goddard – – – 261
Rose, *In re.* Rose's Trustee *v.* Rose – – – – – 348
Rose's Trustee *v.* Rose. *In re* Rose – – – – – 348

S.

St. David's Gold and Copper Mines, Ld., Manners *v.* (C.A.) 593
Sharpe *v.* Hodgson. *In re* Pimm 345
Sharpington *v.* Fulham Guardians 449
Shepheard *v.* Brown & Gregory, Ld. Andrews *v.* Brown & Gregory, Ld. *In re* Brown & Gregory, Ld. – (C.A.) 448
Smelting down Lead with Pit and Sea Coal (Governor and Company for), Lowes *v.* *In re* Lead Company's Workmen's Fund Society – – – 196
Smith *v.* Law Guarantee and Trust Society – (C.A.) 569
South African Supply and Cold Storage Company, *In re.* Wild *v.* The Same – – – 268
——————— Storage Company, Wild *v.* *In re* South African Supply and Cold Storage Company – – 268
Spark *v.* Massey. *In re* Spark's Trusts – – (C.A.) 121
Spark's Trusts, *In re.* Spark *v.* Massey – – (C.A.) 121
Speak, Hoole *v.* – – – 732
Stafford, Gerard *v.* *In re* Lord Stafford's Settlement and Will 72
Stafford's (Lord) Settlement and Will, *In re.* Gerard *v.* Stafford – – – – – 72
Stevens *v.* King – – – 30
Strand Wood Company, *In re* (C.A.) 1

T.

PAGE

Tait *v.* MacLeay – (C.A.) 631
Taylor's Agreement Trusts, *In re* – – – – – 737
Thomas, Battie-Wrightson *v.* *In re* Wrightson – (C.A.) 95
Thursby, Lea *v.* – – – 57
Tringham *v.* Greenhill *In re* Tringham's Trusts – – 487
Tringham's Trusts, *In re.* Tringham *v.* Greenhill – – – 487

V.

Venn, *In re.* Lindon *v.* Ingram 52

W.

Walmesley, Mellor *v.* – – 525
Watkins, North American Land and Timber Company *v.* (C.A.) 233
Werner Motors, Ld. *v.* A. W. Gamage, Ld. – (C.A.) 580
West, Cattley *v.* *In re* Linsley 785
Westmorland (Earl of), New Sharlston Collieries Company *v.* (H.L.) 443, n.
Wheeler, *In re.* Hankinson *v.* Hayter – – – – 66
Wigan *v.* Clinch. *In re* Blunt's Trusts – – – – 767
Wild *v.* South African Supply and Cold Storage Company. *In re* South African Supply and Cold Storage Company – 268
Wimbledon House Estate Company, Attorney-General *v.* – 34
Wingfield & Blew, *In re* (C.A.) 665
Woods, *In re.* Gabellini *v.* Woods – – – – 4
———, Gabellini *v.* *In re* Woods – – – – 4
Wrightson, *In re.* Battie-Wrightson *v.* Thomas (C.A.) 95

Y.

Young *v.* David Payne & Co., Ld. *In re* David Payne & Co., Ld. – – (C.A.) 608

TABLE OF CASES CITED.

A.

		PAGE
Abbot *v.* Weekly	1 Lev. 176	552
Abbott, In re	4 L. T. 576	153
Actien-Gesellschaft für Cartonnagen Industrie *v.* Temler	16 Rep. Pat. Cas. 447	89
Addison *v.* Cox	L. R. 8 Ch. 76	389
Ailesbury (Marquis of) and Lord Iveagh, In re	[1893] 2 Ch. 345	462
Akerman, In re	[1891] 3 Ch. 212	68
Alfreton District Friendly and Provident Society, In re	7 L. T. 817	200
Almada and Tirito Company, In re	38 Ch. D. 415	113
Alston, In re	[1901] 2 Ch. 584	160
Angerstein, In re	[1895] 2 Ch. 883	501
Arden *v.* Arden	29 Ch. D. 702	391
Arnison *v.* Smith	41 Ch. D. 348	735
Aspden *v.* Seddon	L. R. 10 Ch. 394	431, 445
Astley *v.* Essex (Earl)	L. R. 18 Eq. 290	658
Athenæum Life Assurance Society *v.* Pooley	3 De G. & J. 294	748
Attorney-General *v.* Ashbourne Recreation Ground Company	[1903] 1 Ch. 101	34
——— *v.* Bradford Canal Proprietors	15 L. T. 9	37
——— *v.* Chambers	4 D. M. & G. 206	321, 528
——— *v.* ———	4 De G. & J. 55	558
——— *v.* Cleaver	18 Ves. 211	38
——— *v.* Floyer	9 H. L. C. 477	299
——— *v.* Johnson	2 Wils. Ch. 87; 18 R. R. 156	37
——— *v.* Margate Pier and Harbour (Company of Proprietors)	[1900] 1 Ch. 749	454
——— *v.* Middleton	2 Ves. Sen. 327	255
——— *v.* Owen	[1899] 2 K. B. 253	462
——— *v.* Scott	1 Ves. Sen. 413; Amb. 82	645
——— *v.* Selborne (Earl of)	[1902] 1 K. B. 388	297
——— *v.* Sheffield Gas Company	3 D. M. & G. 304	38
——— *v.* Smart	1 Ves. Sen. 72	255
——— *v.* Tomline	12 Ch. D. 214	321
——— *v.* Ward	7 L. J. (O.S.) (Ch.) 114; 31 R. R. 123	647
——— *v.* Webster	L. R. 20 Eq. 483	646
——— *v.* Welsh Granite Company	35 W. R. 617	423

B.

		PAGE
Bach's Design, In re	42 Ch. D. 661	583
Baggs, In re	[1894] 2 Ch. 416, n.	332
Bagott *v.* Orr	2 Bos. & P. 472; 5 R. R. 668.	318
Bahin *v.* Hughes	31 Ch. D. 390	786
Bailey *v.* Stephens	12 C. B. (N.S.) 91	537
Bain *v.* Fothergill	L. R. 7 H. L. 158	507
Baker, In re	[1901] 2 K. B. 628	62
——, In re	32 Beav. 526.	155
—— *v.* Billericay Union	2 H. & C. 642	457
—— *v.* Brereman	Cro. Car. 418.	536
Balkis Consolidated Company *v.* Tomkinson	[1893] A. C. 396	748
Baring-Gould *v.* Sharpington Combined Pick and Shovel Syndicate	[1899] 2 Ch. 80	598
Barker, In re	[1897] W. N. 154 (14)	163
Barney, In re	[1894] 3 Ch. 562	563
Barrow, In re	17 Beav. 547.	155
Barrow Hæmatite Steel Company, In re	[1900] 2 Ch. 846; [1901] 2 Ch. 746	208
Bass *v.* Gregory	25 Q. B. D. 481	538
Bateman (Lord) *v.* Thompson	Hudson on Building Contracts, 2nd ed. vol. ii. p. 106	265
Baty *v.* Keswick	85 L. T. 18; [1901] W. N. 167	735
Baylis, In re	[1896] 2 Ch. 107	364
Beard's Trusts, In re	[1904] 1 Ch. 270	771
Beaumont *v.* Meredith	3 V. & B. 180	200
Beavan *v.* Beavan	24 Ch. D. 649, n.	8
Beckford *v.* Tobin	1 Ves. Sen. 308	694
Bective (Countess of) *v.* Hodgson	10 H. L. C. 656	690
Bedford (Duke) *v.* Ellis	[1901] A. C. 1	201
Bell *v.* Dudley (Earl of)	[1895] 1 Ch. 182	423
—— *v.* Love	10 Q. B. D. 547; 9 App. Cas. 286	431
Bennington *v.* Taylor	2 Lutw. 1517	557
Berkeley *v.* Swinburne	16 Sim. 275	101
Bernasconi *v.* Atkinson	10 Hare, 345.	499
Bettesworth and Richer, In re	37 Ch. D. 535	227
Bignold, In re	9 Beav. 269	155
Bird, In re	[1901] 1 Ch. 916	163
Bird's Trusts, In re	3 Ch. D. 214.	495
Blackburn Building Society *v.* Cunliffe, Brooks & Co.	22 Ch. D. 61.	240
Blackett *v.* Bradley	1 B. & S. 940	424
Blackmore, In re	13 Beav. 154.	364
Blair *v.* Duncan	[1902] A. C. 37	355
Blank *v.* Footman, Pretty & Co.	39 Ch. D. 678	585
Blundell *v.* Catterall	5 B. & Al. 268; 24 R. R. 353	313, 529, 536
Bolton Estates, In re	[1903] 2 Ch. 461	300
Bond, In re	[1901] 1 Ch. 15	739
Boor, In re	40 Ch. D. 572	228
Booth *v.* New Africander Gold Mining Company	[1903] 1 Ch. 295	600
Boss *v.* Hopkinson	18 W. R. 725	392
Botten *v.* City and Suburban Permanent Building Society	[1895] 2 Ch. 441	201
Bowen, In re	[1893] 2 Ch. 491	771

		PAGE
Bower *v.* Marris	Cr. & Ph. 351	572
Bowmer, In re	3 De G. & J. 658	336
Boyce, In re	4 D. J. & S. 205	337
Boyd, In re	[1897] 2 Ch. 232	32
Bradley *v.* Riches	9 Ch. D. 189	615
Brazier *v.* Hudson	8 Sim. 67; 42 R. R. 106	409
Bridger's Case	L. R. 4 Ch. 266	471
Britton, In re	37 W. R. 621	61
Broome *v.* Speak	[1903] 1 Ch. 586; [1904] A. C. 342	733
Brown, In re	L. R. 4 Eq. 464	155
——— *v.* Attorney-General	79 L. T. 572	299
——— *v.* Burdett	40 Ch. D. 244	156
——— *v.* Gellatly	L. R. 2 Ch. 751	4
——— *v.* Temperley	3 Russ. 263	690
Brown & Gregory, Ld., In re	[1904] 1 Ch. 627	748
Browne *v.* Savage	4 Drew. 635	385
Bryant & Co. *v.* La Banque du Peuple	[1893] A. C. 170	221
Buccleuch (Duke of) *v.* Wakefield	L. R. 4 H. L. 377	422
Buchanan *v.* Andrew	L. R. 2 H. L., Sc. 286	423
Buckland *v.* Papillon	L. R. 2 Ch. 67	350
Buller *v.* Plunkett	1 J. & H. 441	390
Bunting *v.* Lepingwell	4 Rep. 29 b	490
Burdett-Coutts *v.* True Blue (Hannan's) Gold Mine	[1899] 2 Ch. 616	599
Burrowes *v.* Lock	10 Ves. 470; 8 R. R. 33, 856.	659
Bury Corporation *v.* Lancashire and Yorkshire Railway Company.	20 Q. B. D. 485	516
Butcher *v.* Butcher	1 V. & B. 79; 12 R. R. 193	329
Butler *v.* Butler	3 Atk. 58	690
Byng's Settled Estates, In re	[1892] 2 Ch. 219	76

C.

Caldecott *v.* Caldecott	1 Y. & C. Ch. 312; 57 R. R. 345	7
Caledonian Railway Company *v.* Greenock and Wemyss Bay Railway Company	L. R. 2 H. L., Sc. 347; 10 Ct. Sess. Cas. 3rd Series, 892	124
Calisher *v.* Forbes	L. R. 7 Ch. 109	390
Campbell, In re	[1902] 1 K. B. 113	462
Capital and Counties Bank *v.* Rhodes	[1903] 1 Ch. 631	60, 478
Cardigan (Earl of) *v.* Armitage	2 B. & C. 197; 26 R. R. 313	434
Castellain *v.* Preston	11 Q. B. D. 380	185
Caton *v.* Caton	L. R. 1 Ch. 137	339
Chamber Colliery Company *v.* Twyerould	July 20, 1893, H. L. (not reported)	445
Chamberlain & Hookham, Ld. *v.* Bradford Corporation	83 L. T. 518	454
Chambers *v.* Goldwin	11 Ves. 1; 8 R. R. 61	690
Champion, In re	[1893] 1 Ch. 101	498
Chapleo *v.* Brunswick Permanent Building Society	6 Q. B. D. 696.	614
Chapman's Case	[1895] 1 Ch. 771	113
Charlton *v.* Attorney-General	4 App. Cas. 427	299
Chauncy *v.* Graydon	2 Atk. 616	656
Cherry *v.* Boultbee	4 My. & Cr. 442; 48 R. R. 150	68

		PAGE
Chesterfield's (Earl of) Trusts, In re	24 Ch. D. 643	8
Christie *v.* Gosling	L. R. 1 H. L. 279	500
——— *v.* Taunton, Delmard, Lane & Co.	[1893] 2 Ch. 175	748
Clarke, In re	36 Ch. D. 348	389
——— *v.* Thornton	35 Ch. D. 307	24
Clements, In re	[1894] 1 Ch. 665	690
——— *v.* Bowes	17 Sim. 167	200
Clemow, In re	[1900] 2 Ch. 182	782
Cleveland's (Duke of) Estate, In re	[1895] 2 Ch. 542	8
Clinch *v.* Financial Corporation	L. R. 5 Eq. 450	599
Cobb *v.* Cobb's Trustees	21 R. 638	355
Coffin *v.* Cooper	2 Dr. & Sm. 365	329, 352
Cole *v.* Sewell	4 D. & War. 1; 65 R. R. 668	99
Coleridge's (Lord) Settlement, In re	[1895] 2 Ch. 704	24
Collyer *v.* Isaacs	19 Ch. D. 342	408
Combe's (Abbot of) Case	43 Ass. 275, pl. 37; Bro. Abr. tit. "Presentments in Court," 22, 29	515
Commissioners for Special Purposes of Income Tax *v.* Pemsel	[1891] A. C. 531	647
Consett Waterworks Company *v.* Ritson	22 Q. B. D. 318, 702; 64 L. J. (Ch.) 293, n.	419
Coolgardie Consolidated Gold Mines, Ld., In re	76 L. T. 269	241
Copland's Settlement, In re	[1900] 1 Ch. 326	563
Corbyn *v.* French	4 Ves. 418	33
Cork and Youghal Railway Company, In re	L. R. 4 Ch. 748	241
Cotton, In re	1 Ch. D. 232	703
——— *v.* Imperial and Foreign Agency and Investment Corporation	[1892] 3 Ch. 454	599
Court *v.* Berlin.	[1897] 2 Q. B. 396	668
Courtenay *v.* Williams	3 Hare, 539; 64 R. R. 403	68
Cowell *v.* Taylor	31 Ch. D. 34	2
Cowling *v.* Higginson	4 M. & W. 245; 51 R. R. 555	539
Cox *v.* Cox	L. R. 8 Eq. 343	162
Craythorne *v.* Swinburne	14 Ves. 160; 9 R. R. 264	178
Crickett *v.* Dolby	3 Ves. 10	694
Crisp *v.* Bunbury	8 Bing. 394; 34 R. R. 747	131
Crossing *v.* Scudamore	1 Vent. 137	247
Crowder *v.* Stewart	16 Ch. D. 368	775
Crozat *v.* Brogden	[1894] 2 Q. B. 30	360
Cunnack *v.* Edwards	[1896] 2 Ch. 679	200

D.

Dalton *v.* Angus	6 App. Cas. 740	433, 538
Dand *v.* Kingscote	6 M. & W. 174; 55 R. R. 560	434
Dane *v.* Mortgage Insurance Corporation	[1894] 1 Q. B. 54	184
Darley *v.* Martin	13 C. B. 683	52
Davies *v.* Parry	[1899] 1 Ch. 602	776
——— *v.* Swansea Corporation	8 Ex. 808	453
Davis *v.* Treharne	6 App. Cas. 460	422, 445
Davis's Case	L. R. 12 Eq. 516	608
Davis & Sons *v.* Taff Vale Railway Company	[1895] A. C. 542	131
Day *v.* Singleton	[1899] 2 Ch. 320	503

		PAGE
Dean *v.* Dean	[1891] 3 Ch. 150	95
Dearberg *v.* Letchford	72 L. T. 489	490, 757
Dearle *v.* Hall	3 Russ. 1; 27 R. R. 1	385
De la Cour *v.* Clinton	20 Times L. R. 420, 706	632, 635
Dering *v.* Winchelsea (Earl)	1 Cox, 318; 2 W. & T. (7th ed.) 535; 1 R. R. 41	184
Devonport Corporation *v.* Tozer	[1903] 1 Ch. 759	37
Dickens *v.* Shaw	Hall on the Seashore, 2nd ed. App. p. xlv.	320
Dickson, In re	8 D. M. & G. 655	156
———, In re	29 Ch. D. 331	695
Dimes *v.* Scott	4 Russ. 195; 28 R. R. 46	7
Direct Spanish Telegraph Company, In re	34 Ch. D. 307	211
Dixon *v.* White	8 App. Cas. 833	431, 445
Doe *v.* Beauclerk (Lord)	11 East, 657; 11 R. R. 307	660
—— *v.* Galloway	5 B. & Ad. 43; 39 R. R. 381	533
—— *v.* Hicks	1 Cl. & F. 20; 36 R. R. 1	99
—— *v.* Morgan	3 T. R. 763	98
Doherty *v.* Allman	3 App. Cas. 709	379
Donovan *v.* Needham	9 Beav. 164	691
Doughty *v.* Lomagunda Reefs, Ld.	[1902] 2 Ch. 837	598
Drummond's Patent, In re	6 Rep. Pat. Cas. 576	357
Du Cane and Nettlefold's Contract, In re	[1898] 2 Ch. 96	463
Duffett *v.* McEvoy	10 App. Cas. 300	364
Duffield *v.* Duffield	3 Bli. (N.S.) 260; 1 Dow. & Cl. 268; 32 R. R. 70	101
Dugdale *v.* Robertson	3 K. & J. 695	435
Durham and Sunderland Railway Company *v.* Walker	2 Q. B. 940; 57 R. R. 842	43
Dyce *v.* Hay	1 Macq. 305	537

E.

Eaton, In re	[1894] W. N. 95	8
———, In re	70 L. T. 761	15
Edwards *v.* Hammond	1 Bos. & P. (N.R.) 324, n.; 8 R. R. 815, n.	101
Ellesmere Brewery Company *v.* Cooper	[1896] 1 Q. B. 75	184
Ellis *v.* Ellis	1 Sch. & Lef. 1	692
—— *v.* Emmanuel	1 Ex. D. 157.	184
—— *v.* Selby	1 My. & Cr. 292; 43 R. R. 188	354
—— *v.* Silber	L. R. 8 Ch. 83	61
Emma Silver Mining Company *v.* Lewis & Son	4 C. P. D. 396	735
Engel *v.* South Metropolitan Brewing and Bottling Company	[1892] 1 Ch. 442	171
Espley *v.* Wilkes	L. R. 7 Ex. 298	528
Eton College *v.* Winchester (Bishop)	3 Wils. 483	299
Evans, Ex parte	13 Ch. D. 252	93

F.

Faithfull, In re	57 L. T. 14	775
Fielding *v.* Morley Corporation	[1899] 1 Ch. 1	453
Finlay *v.* Mexican Investment Corporation	[1897] 1 Q. B. 517	184

		PAGE
Finley, In re	21 Q. B. D. 475	62
Fitch *v.* Rawling	2 H. Bl. 393; 3 R. R. 425	536
Fitzgerald *v.* Fitzgerald	[1902] 1 I. R. 477	495
Flitcroft's Case	21 Ch. D. 519	47
Foley *v.* Attorney-General	7 Bro. P. C. 249	645
—— *v.* Burnell	1 Bro. C. C. 274	501
Folkestone Corporation *v.* Brooks	[1893] 3 Ch. 22	142
Fontaine's Case	41 Ch. D. 118	360
Ford's Hotel Company *v.* Bartlett	[1896] A. C. 1	131
Foster, In re	45 Ch. D. 629	160
——— *v.* Cockerell	3 Cl. & F. 456; 39 R. R. 24	392
——— *v.* Wright	4 C. P. D. 438	547
Fox, Ex parte	L. R. 6 Ch. 176	599
—— *v.* Garrett	28 Beav. 16	775
Frame *v.* Dawson	14 Ves. 386; 9 R. R. 304	341
Frape (No. 2), In re	[1894] 2 Ch. 290	675
Freman, In re	[1898] 1 Ch. 28	564
Fry's (Lady) Case	1 Vent. 199	658
Furness Railway Company *v.* Cumberland Co-operative Building Society	52 L. T. 144	528
Fyson, In re	9 Beav. 117	155

G.

Garde *v.* Garde	3 D. & War. 435	757
Garrod, In re	31 Ch. D. 164	330
Garth *v.* Baldwin	2 Ves. Sen. 646	489
General Accident Assurance Corporation, In re	[1904] 1 Ch. 147	737
George, In re	5 Ch. D. 837	691
George Whitechurch, Ld. *v.* Cavanagh	[1902] A. C. 117	367
German Date Coffee Company, In re	20 Ch. D. 169	241
Gibson *v.* Bott	7 Ves. 89; 6 R. R. 87	7
Gilbertson *v.* Fergusson	7 Q. B. D. 562	626
Gilchrist, Ex parte	17 Q. B. D. 521	350
Gill *v.* Dickinson	5 Q. B. D. 159	423
Gomersall, In re	1 Ch. D. 137; 2 App. Cas. 616	635
Goodenough, In re	[1895] 2 Ch. 537	8
Goodman *v.* Saltash Corporation	7 App. Cas. 633	556, 650
Gordon *v.* Gordon	[1904] P. 163	677
Gosling *v.* Gosling	1 D. J. & S. 1	500
Goy & Co., In re	[1900] 2 Ch. 149	48, 743
Grand Junction Waterworks Company *v.* Hampstead Urban Council	15 Times L. R. 412	454
——— *v.* Hampton Urban Council	[1898] 2 Ch. 331	38
Gray, In re	[1901] 1 Ch. 239	152
Green *v.* Belchier	1 Atk. 505	697
Grey-Coat Hospital (Governors) *v.* Westminster Improvement Commissioners	1 De G. & J. 531	94
Grice *v.* Shaw	10 Hare, 76	62
Griffith *v.* Paget	5 Ch. D. 894	600
Grindell *v.* Godmond	5 Ad. & E. 755; 44 R. R. 573	676
Grover *v.* Raper	5 W. R. 134	52
Groves *v.* Wimborne (Lord)	[1898] 2 Q. B. 402	131

H.

		PAGE
Hall *v.* Nottingham	1 Ex. D. 1	537
Halliday *v.* Harris	L. R. 9 C. P. 668	60
Hammerton *v.* Honey	24 W. R. 603	537
Hammond *v.* Bradstreet	10 Ex. 390	545
Hampden *v.* Buckinghamshire (Earl of)	[1893] 2 Ch. 531	77
Hampshire Land Company, In re	[1896] 2 Ch. 743	615
Hanson *v.* Graham	6 Ves. 239; 5 R. R. 837	691
Hargreaves, In re	86 L. T. 43	8
Harrington *v.* Harrington	L. R. 3 Ch. 564; L. R. 5 H. L. 87	500
Harris *v.* Ryding	5 M. & W. 60; 52 R. R. 632	435
Harrison *v.* Harrison	13 P. D. 180	668
Hart *v.* Tulk	2 D. M. & G. 300	498
Harvey *v.* Harvey	2 P. Wms. 21	690
Harwood, In re	35 Ch. D. 470	221, 331
Hawksley *v.* Outram	[1892] 3 Ch. 359	241
Haynes, In re	37 Ch. D. 306	779
Heap *v.* Hartley	5 Rep. Pat. Cas. 603	89
Hearle *v.* Greenbank	3 Atk. 695	691
Heath *v.* Perry	3 Atk. 101	691
Heath & Sons *v.* Rollason	[1898] A. C. 499	583
Hecla Foundry Company *v.* Walker, Hunter & Co.	14 App. Cas. 550	582
Herron *v.* Rathmines and Rathgar Improvement Commissioners	[1892] A. C. 498	131
Hext *v.* Gill	L. R. 7 Ch. 699	423
Higginson and Dean, In re	[1899] 1 Q. B. 325	739
Highett and Bird's Contract, In re	[1902] 2 Ch. 214; [1903] 1 Ch. 287	226, 227
Hill, In re	50 L. J. (Ch.) 551; 45 L. T. 126	9
——, In re	[1902] 1 Ch. 537, 807	501
—— *v.* Burns	2 Wils. & S. 80	355
Hill's Settlement Trusts, In re	75 L. T. 477	15
Hindson *v.* Ashby	[1896] 1 Ch. 1	547
Hirst, In re	[1892] W. N. 177	348
Hodge's Legacy, In re	L. R. 16 Eq. 92	658
Hodgson *v.* Bective (Earl of)	1 H. & M. 376	690
Holliday and Godlee, In re	58 L. T. 301	155
——— *v.* Overton	14 Beav. 467; 15 Beav. 480; 16 Jur. 751	489, 490, 492, 750
Holroyd *v.* Marshall	10 H. L. C. 191	390
Hooper *v.* Western Counties and South Wales Telephone Company	41 W. R. 84	279
Hopkins *v.* Hopkins	1 Atk. 581	98
Hornby *v.* Houlditch	cited 1 T. R. 93, n.	299
Horne *v.* Struben	[1902] A. C. 454	528
Hotchkys, In re	32 Ch. D. 408	564
Hotham, In re	[1902] 2 Ch. 575	24
Howard's (Sir Charles) Case	Cro. Car. 59	509
Howe *v.* Dartmouth (Earl of)	7 Ves. 137; 6 R. R. 96; 1 W. & T. 7th ed. 68	7
Hudson, In re	72 L. T. 892	757
Hull and Selby Railway Company, In re	5 M. & W. 327; 52 R. R. 733	528, 558
Humphreys, In re	[1893] 3 Ch. 1	690

		PAGE
Hunt *v.* De Blaquiere	5 Bing. 550; 30 R. R. 737	676
Hunter, In re	[1897] 2 Ch. 105; [1899] A. C. 309	645
Hyde Corporation *v.* Bank of England	21 Ch. D. 176	720

I.

Imperial Bank of China, India and Japan *v.* Bank of Hindustan, China and Japan	L. R. 6 Eq. 91	599
Incandescent Gas Light Company *v.* Cantelo	12 Rep. Pat. Cas. 262	308
Independant Protestant Loan Fund Society, In re	[1895] I. R. 1	200
Ingle *v.* Vaughan Jenkins	[1900] 2 Ch. 368	60
International Tea Stores Company *v.* Hobbs	[1903] 2 Ch. 165	529
Ireland *v.* Powell	cited 7 Ad. & E. 555; 45 R. R. 762	543

J.

Jackson, In re	40 Ch. D. 495	364
Jarman's Estate, In re	8 Ch. D. 584	356
Jemmit *v.* Verril	cited in Amb. 585, n.	354
Jeremiah Ambler & Sons, Ld. *v.* Bradford Corporation	[1902] 2 Ch. 585	454
John Harper & Co., Ld. *v.* Wright & Butler Lamp Manufacturing Company	[1896] 1 Ch. 142	583
Johnstone *v.* Cox	16 Ch. D. 571; 19 Ch. D. 17	385
Jones, In re	8 Beav. 479; 68 R. R. 160	155
——, In re	36 Ch. D. 105	675
—— *v.* Charlemont (Lord)	16 Sim. 271	200
—— *v.* Gordon	2 App. Cas. 616	635

K.

Keegan *v.* Smith	5 B. & C. 375; 29 R. R. 273	669
Kellett *v.* Kellett	L. R. 3 H. L. 160	99
Kemp *v.* Wright	[1895] 1 Ch. 121	201
Kettlewell *v.* Watson	21 Ch. D. 685	615
King, In re	[1904] 1 Ch. 363	346, 782
Kingsbury *v.* Walter	[1901] A. C. 187	54
Kinnis *v.* Graves	67 L. J. (Q.B.) 583	38
Kirk, In re	21 Ch. D. 431	779

L.

Ladies' Dress Association *v.* Pulbrook	[1900] 2 Q. B. 376	471
Lambert, In re	[1897] 2 Ch. 169	8
Lands Allotment Company, In re	[1894] 1 Ch. 616	242
Last *v.* London Assurance Corporation	10 App. Cas. 438	624
Leadbitter, In re	10 Ch. D. 363	363
Leake *v.* Robinson	2 Mer. 363; 16 R. R. 168	699
Lechmere and Lloyd, In re	18 Ch. D. 524	95
Legg *v.* Mackrell	2 D. F. & J. 551	775

		PAGE
Le May *v.* Welch	28 Ch. D. 24	582
Lever, In re	[1897] 1 Ch. 32	562
Leveridge, In re	[1901] 2 Ch. 830	346, 782
Lewis, In re	[1900] 2 Ch. 176	346, 781
Leyton Local Board *v.* Causton	57 J. P. 135	37
Linn-Regis Corporation *v.* Taylor	3 Lev. 160	536
Liquidation Estates Purchase Company *v.* Willoughby	[1898] A. C. 321	477
Little, In re	40 Ch. D. 418	331
Llandudno Urban Council *v.* Woods	[1899] 2 Ch. 705	317
Llewellyn *v.* Jersey (Earl of)	11 M. & W. 183; 63 R. R. 569	528
Lloyd *v.* Banks	L. R. 3 Ch. 488	389
—— *v.* Dimmack	7 Ch. D. 398	379
—— *v.* Loaring	6 Ves. 773	200
Lloyd's Bank *v.* Pearson	[1901] 1 Ch. 865	412
Lockhart *v.* Reilly	25 L. J. (Ch.) 697	785
Lockwood *v.* Wood	6 Q. B. 31; 66 R. R. 265	536
London and North Western Railway Company *v.* Billington	[1899] A. C. 79	131
Company *v.* Donellan	[1898] 2 Q. B. 7	135
London, Chatham and Dover Railway Company *v.* South Eastern Railway Company	[1892] 1 Ch. 120; [1893] A. C. 429	9
	40 Ch. D. 100	124
London Corporation *v.* Cox	L. R. 2 H. L. 239	130
London County Council *v.* Attorney-General	[1902] A. C. 165	37
	[1901] A. C. 26	572, 626
Lord Advocate *v.* Jamieson	13 R. 737	300
—— *v.* Young	12 App. Cas. 544	321
Love *v.* Bell	9 App. Cas. 286	422, 445
Lovelace's Settlement, In re	4 De G. & J. 340	299
Lovett *v.* Lovett	[1898] 1 Ch. 82	658
Low *v.* Bouverie	[1891] 3 Ch. 82	367, 657
Lowenthal, In re	13 Q. B. D. 238	60
Lucas *v.* Brandreth	28 Beav. 274	489, 756
Lukey *v.* Higgs	24 L. J. (Ch.) 495	176
Lynch Blosse, In re	[1899] W. N. 27 (8)	4
Lyon *v.* Mitchell	[1899] W. N. 27 (6)	163

M.

McConnel *v.* Wright	[1903] 1 Ch. 546	632
Mace *v.* Philcox	15 C. B. (N.S.) 600	317
McEacharn *v.* Colton	[1902] A. C. 104	380
M'Kenny *v.* Barnsley Corporation	10 Times L. R. 533	201
Mackenzie's Trusts, In re	23 Ch. D. 750	75
McManus *v.* Cooke	35 Ch. D. 681	341
Maddison *v.* Alderson	8 App. Cas. 467	342
Mahony *v.* East Holyford Mining Company	L. R. 7 H. L. 869	614
Manby *v.* Scott	2 Sm. L. C. 11th ed. p. 446	669
Manchester, Sheffield and Lincolnshire Railway Company *v.* Doncaster Union	[1897] 1 Q. B. 117	457
Manchester Ship Canal Company *v.* Manchester Racecourse Company	[1900] 2 Ch. 352	131

		PAGE
Marlborough (Duke of) and Governors of Queen Anne's Bounty	[1897] 1 Ch. 712	76
Marlborough's (Duke of) Settlement, In re	30 Ch. D. 127; 32 Ch. D. 1	72
Marrs *v.* Thompson	86 L. T. 759	201
Marseilles Extension Railway Company, In re	L. R. 7 Ch. 161	615
Martelli *v.* Holloway	L. R. 5 H. L. 532	501
Marten, In re	[1902] 1 Ch. 314	32
Martin *v.* Martin	L. R. 1 Eq. 369	690
Maryon-Wilson, In re	[1900] 1 Ch. 565	782
Mason's Orphanage and London and North Western Railway Company, In re	[1896] 1 Ch. 596	252
Massey, In re	34 Beav. 463; 34 L. J. (Ch.) 492	155
Mayne *v.* Mayne	[1897] 1 I. R. 324	66
Medlock, In re	55 L. J. (Ch.) 738	690
Meux *v.* Bell	1 Hare, 73; 58 R. R. 41	391
Meyer *v.* Simonsen	5 De G. & Sm. 723	7
Meyler *v.* Meyler	11 L. R. Ir. 522	490, 761
Middleton *v.* Barker	29 L. T. 643	490
——— *v.* ———	[1873] W. N. 231	757
Midland Railway Company *v.* Edmonton Union	[1895] A. C. 485	457
——— *v.* Loseby & Carnley	[1899] A. C. 133	135
——— *v.* Withington Local Board	11 Q. B. D. 788	453
Miles *v.* Jarvis	24 Ch. D. 633	95
Miller *v.* Black's Trustees	2 Sh. & McL. 866	355
Milward & Co., In re	[1900] 1 Ch. 405	361
Mole *v.* Mole	1 Dick. 310	694
Monson's (Lord) Settled Estates, In re	[1898] 1 Ch. 427	76
Monypenny *v.* Dering	2 D. M. & G. 145	102
Moody, In re	[1895] 1 Ch. 101	691
Moore, In re	54 L. J. (Ch.) 432	160
Morecroft, In re	29 Sol. J. 471	153
Morley, In re	[1895] 2 Ch. 738	9
Morrell *v.* Fisher	4 Ex. 591	533
Morrison *v.* Trustees, Executors, and Securities Insurance Corporation	79 L. T. 605	471
Morton *v.* Bank of England	[1904] 1 Ch. 664	720
Moss, In re	[1899] 2 Ch. 314; [1901] A. C. 187	54
Moule *v.* Garrett	L. R. 5 Ex. 132	379
Mounsey *v.* Ismay	3 H. & C. 486	536
Mowatt *v.* Castle Steel and Iron Works Company	34 Ch. D. 58	477
Moxhay *v.* Inderwick	1 De G. & Sm. 708	176
Mundy *v.* Jolliffe	5 My. & Cr. 167; 48 R. R. 262	341
Mundy and Roper's Contract, In re	[1899] 1 Ch. 275	76, 462
Mundy's Settled Estates, In re	[1891] 1 Ch. 399	75
Municipal Permanent Investment Building Society *v.* Kent	9 App. Cas. 260	149
Mutual Life Assurance Society *v.* Langley	26 Ch. D. 686; 32 Ch. D. 460	392

N.

		PAGE
National Telephone Company *v.* Kingston-upon-Hull Corporation	1 L. G. R. 777	456
Needham's Case	L. R. 4 Eq. 135	470
Negus, In re	[1895] 1 Ch. 73	153
Nevill, In re	31 Ch. D. 161	330
New Balkis Eersteling, Limited *v.* Randt Gold Mining Company	[1904] A. C. 165	469
New Sharlston Collieries Company *v.* Westmorland (Earl of)	79 L. T. 716; 80 L. T. 846; 82 L. T. 725; [1904] 2 Ch. 443, n.	419, 423, 445
New Zealand Gold Extraction Company *v.* Peacock	[1894] 1 Q. B. 622	279
Newbegin's Estate, In re	36 Ch. D. 477	467
Newman, In re.	L. R. 2 Ch. 707	155
Nicholas *v.* Chamberlain	Cro. Jac. 121.	19
Nichols to Nixey	29 Ch. D. 1005	350
Nicholson, In re	[1895] W. N. 106	8
Nobel's Explosives Company *v.* Jones, Scott & Co.	42 L. T. 754.	88
Norfolk's (Duke of) Parliamentary Estates, In re	[1900] 1 Ch. 461	24
Nottingham County Council *v.* Manchester, Sheffield and Lincolnshire Railway Company	71 L. T. 430.	517
Nunn *v.* Fabian	L. R. 1 Ch. 35	341

O.

Oldham Our Lady's Sick and Burial Society *v.* Taylor	3 Times L. R. 472	201
Ooregum Gold Mining Company of India *v.* Roper	[1892] A. C. 125	111
Ottaway *v.* Hamilton	3 C. P. D. 393.	668
Otter *v.* Vaux (Lord)	6 D. M. & G. 638	476
Otway *v.* Otway	13 P. D. 141.	676
Owen, In re	23 L. R. Ir. 328	775

P.

Paget's Settled Estates, In re	30 Ch. D. 161	779
Pain *v.* Coombs	1 De G. & J. 34	341
—— *v.* Patrick	3 Mod. 289.	536
Palmer *v.* Locke	15 Ch. D. 294	338
Parker *v.* London County Council	68 J. P. 239; [1904] 2 K. B. 501	454
Partington *v.* Attorney-General	L. R. 4 H. L. 100	297
Payne *v.* The Cork Company	[1900] 1 Ch. 308	598
Pearce *v.* Piper.	17 Ves. 1; 11 R. R. 1	197
Pearks *v.* Moseley	5 App. Cas. 714	99
Pelly, Ex parte	21 Ch. D. 492	47
Pett *v.* Fellows	1 Swans. 561, n.	692
Philips *v.* Philips	3 Hare, 281; 64 R. R. 296	32
Phillimore, In re	[1903] 1 Ch. 942	160
Phipps *v.* Ackers	3 Cl. & F. 702; 39 R. R. 115.	101
Pimm, In re	[1904] 2 Ch. 345	781

		PAGE
Poole and Clarke's Contract, In re	[1904] 2 Ch. 173	376
Postlethwaite *v.* Port Phillip and Colonial Gold Mining Company	43 Ch. D. 452	599
Powell *v.* Rawle	L. R. 18 Eq. 243	658
Powell (W.) & Sons, In re	[1896] 1 Ch. 681	2
Powys *v.* Blagrave	4 D. M. & G. 448	564
Price *v.* Easton	4 B. & Ad. 433	308
—— *v.* Torrington (Lord)	1 Salk. 285; 2 Sm. L. C. 11th ed. 320	525
—— *v.* ——	1 Salk. 285; 2 Ld. Raym. 873	541
Printers and Transferrers Amalgamated Trades Protection Society, In re	[1899] 2 Ch. 184	197
Proud *v.* Bates	34 L. J. (Ch.) 406	435
Pryce-Jones *v.* Williams	[1902] 2 Ch. 517	739
Pugh *v.* Drew	17 W. R. 988	487, 756
Pulbrook *v.* New Civil Service Co-operation	26 W. R. 11	279
Purefoy *v.* Rogers	2 Saund. (6th ed.) 380	99

Q.

Queensland Land and Coal Company, In re	[1894] 3 Ch. 181	477

R.

Race *v.* Ward	4 E. & B. 702	537
Radcliffe, In re	[1892] 1 Ch. 227	349
Randell, In re	38 Ch. D. 213	771
Randfield *v.* Randfield	8 H. L. C. 225	99
Randoll *v.* Doe	5 Dow, 202; 14 R. R. 448	101
Randt Gold Mining Company *v.* New Balkis Eersteling, Ld.	[1903] 1 K. B. 461; [1904] A. C. 165	469
Rangeley *v.* Midland Railway Company	L. R. 3 Ch. 306	537
Redfern, In re	6 Ch. D. 133	498
Reg. *v.* Bliss	7 Ad. & E. 550; 45 R. R. 757	543
—— *v.* Gee	1 E. & E. 1068	529
—— *v.* Hall	[1891] 1 Q. B. 747	38
—— *v.* Isle of Ely (Inhabitants of)	15 Q. B. 827	516
—— *v.* Lincoln Corporation	8 Ad. & E. 65; 47 R. R. 484	515
—— *v.* Robson	16 Q. B. D. 137	202
—— *v.* Stepney Union	L. R. 9 Q. B. 383	457
Renard *v.* Levinstein	2 H. & M. 628	89
Rex *v.* Crunden	2 Camp. 89; 11 R. R. 671	319
—— *v.* Kent (Inhabitants of)	13 East, 220; 12 R. R. 330	516
—— *v.* Kerrison	3 M. & S. 526; 16 R. R. 342	516
—— *v.* Lindsey (Inhabitants of)	14 East, 317; 12 R. R. 529	516
—— *v.* Staffordshire and Worcestershire Canal Company	65 J. P. 505	517
—— *v.* West Riding of York (Inhabitants of)	7 East, 588; 8 R. R. 688; 5 Taunt. 283; 2 Dow, 1; 14 R. R. 751	515
Rhoades, In re	[1899] 2 Q. B. 347	776
Rhodes, In re	44 Ch. D. 94	466
Roberts *v.* Haines	6 E. & B. 643; 7 E. & B. 625	435
—— *v.* Karr	1 Taunt. 495; 10 R. R. 592	528
Roe *v.* Tranmarr	Willes, 682; 2 Wils. 75	240

		PAGE
Rollason's Registered Design, In re	[1898] 1 Ch. 237	583
Rose *v.* Watson	10 H. L. C. 672	94
Rothes (Countess) *v.* Kirkcaldy and Dysart Waterworks Commissioners	7 App. Cas. 694	131
Rowbotham *v.* Wilson	8 H. L. C. 348	434
Rowlls *v.* Bebb	[1900] 2 Ch. 107	9
Roxburghe *v.* Cox	17 Ch. D. 520	392
Rumball *v.* Schmidt	8 Q. B. D. 603	41
Russel *v.* Buchanan	7 Sim. 628; 2 Cr. & M. 561; 40 R. R. 193	95

S.

Safety Explosives, Ld., In re	[1904] 1 Ch. 226	661
Saffron Walden Second Benefit Building Society *v.* Rayner	14 Ch. D. 406	389
St. Stephen, Coleman Street, In re	39 Ch. D. 492	645
Salisbury (Marquis of) *v.* Gladstone	9 H. L. C. 692	552
Salt, In re	[1896] 1 Ch. 117	333
Saltoun (Lord) *v.* Advocate-General	3 Macq. 659	296
Sander *v.* Heathfield	L. R. 19 Eq. 21	775
Scarsdale (Lord) *v.* Curzon	1 J. & H. 40	501
Scott, In re	[1902] 1 Ch. 918	686
Scott's Patent, In re	20 Rep. Pat. Cas. 604	357
Scratton *v.* Brown	4 B. & C. 485; 28 R. R. 344	528
Seaton *v.* Heath	[1899] 1 Q. B. 782	184
Semenza, In re	[1894] 1 Q. B. 15	360
Seventh East Central Building Society, In re	51 L. T. 109	3
Shaw *v.* Simmons	12 Q. B. D. 117	201
Shawe *v.* Cunliffe	4 Bro. C. C. 144	690
Shepheard *v.* Broome	[1904] A. C. 342	733
Shore *v.* Wilson	9 Cl. & F. 355; 57 R. R. 2	645
Shortridge, In re	[1895] 1 Ch. 278	330
Shropshire Union Railways and Canal Company *v.* Reg.	L. R. 7 H. L. 496	405
Shuttleworth *v.* Le Fleming	19 C. B. (N.S.) 687	537
Silver *v.* Barnes	6 Bing. N. C. 180	200
Simm *v.* Anglo-American Telegraph Company	5 Q. B. D. 188	748
Simpson *v.* Bathurst	L. R. 5 Ch. 193	350
——— *v.* Wells	L. R. 7 Q. B. 214	555
Skeats' Settlement, In re	42 Ch. D. 522	330
Skerratt *v.* Oakley	7 T. R. 492; 4 R. R. 504	55
Smart *v.* Morton	5 E. & B. 30	435
Smith, In re	25 Q. B. D. 536	61
———, In re	[1899] 1 Ch. 331	779
——— *v.* Chadwick	20 Ch. D. 27; 9 App. Cas. 187	735
——— *v.* Darby	L. R. 7 Q. B. 716	430, 445
——— *v.* Kay	7 H. L. C. 750	657
——— *v.* Milles	1 T. R. 475	391
Somerset *v.* Cox	33 Beav. 634	390
Somes, In re	[1896] 1 Ch. 250	349
South Blackpool Hotel Company, In re	L. R. 8 Eq. 225	748
Sowerby's Trust, In re	2 K. & J. 630	32
Sparrow, In re	L. R. 5 Ch. 662	336
Staines *v.* Morris	1 V. & B. 8; 38 R. R. 706	175
Stamford's (Lord) Settled Estates, In re	43 Ch. D. 84	75

		PAGE
Steel *v.* Dixon	17 Ch. D. 825	184
Stephens *v.* Mysore Reefs (Kangundy) Mining Company	[1902] 1 Ch. 745	241
Stevens *v.* Mid-Hants Railway Company	L. R. 8 Ch. 1064	479
Stewart *v.* Kingsale	[1902] 1 I. R. 496	161
Stock *v.* Meakin	[1900] 1 Ch. 683	227
Stocken's Case	L. R. 5 Eq. 6; 3 Ch. 412	471
Strand Music Hall Company, In re	3 D. J. & S. 147; 35 Beav. 153	239, 477
Strand Wood Company, In re	[1904] W. N. 122; [1904] 2 Ch. 1	171
Stranks *v.* St. John	L. R. 2 C. P. 376	507
Strong *v.* Carlyle Press	[1893] 1 Ch. 268	171
Sturla *v.* Freccia	5 App. Cas. 623	541
Suffolk (Earl of) *v.* Cox	15 W. R. 732	407
Surtees *v.* Woodhouse	[1903] 1 K. B. 396	229
Sutherland (Dowager Duchess of) *v.* Sutherland (Duke of)	[1893] 3 Ch. 169	503
Sutton, In re	28 Ch. D. 464	354
Symes *v.* Symes	[1896] 1 Ch. 272	98

T.

Taddy & Co. *v.* Sterious & Co.	[1904] 1 Ch. 354	306
Tailby *v.* Official Receiver	13 App. Cas. 523	389
Tanistry Case	Davies Rep. 78	536
Tatham *v.* Vernon	29 Beav. 604	489, 756
Taylor, In re	18 Beav. 165.	155
——— *v.* Clark	1 Hare, 161	9
——— *v.* Frobisher	5 De G. & Sm. 191	101
——— *v.* Richardson	2 Drew. 16	498
Teissier's Settled Estates, In re	[1893] 1 Ch. 153	564
Tempest *v.* Camoys (Lord)	21 Ch. D. 571	329
Thellusson *v.* Liddard	[1900] 2 Ch. 635	61
Theys, Ex parte	25 Ch. D. 587	48
Thompson *v.* Mein	[1893] W. N. 202	432
Thorne *v.* Cann	[1895] A. C. 11	476
Timson *v.* Ramsbottom	2 Keen, 35; 44 R. R. 183	399
Toms *v.* Clacton Urban Council	14 Times L. R. 474	454
Topham *v.* Portland (Duke of)	L. R. 5 Ch. 40	329
Tottenham Local Board of Health *v.* Rowell	15 Ch. D. 378	227
Treasure, In re	[1900] 2 Ch. 648	782
Trechmann *v.* Calthorpe	20 Times L. R. 420, 706	632, 635
Trevor *v.* Hutchins	[1896] 1 Ch. 844	776
Tringham's Trusts, In re	The Times, July 11, 1904; [1904] 2 Ch. 487; [1904] W. N. 153.	756
Trotter, In re	[1899] 1 Ch. 764	498
Truro Corporation *v.* Rowe	[1901] 2 K. B. 870; [1902] 2 K. B. 709	548
Tubbs *v.* Wynne	[1897] 1 Q. B. 74	226
Tucker's Settled Estates, In re	[1895] 2 Ch. 468	564
Turner, In re	[1897] 1 Ch. 536	786
———, In the Goods of	12 P. D. 18	350
——— *v.* Martin	7 D. M. & G. 429	32
——— *v.* Newport	2 Ph. 14	10, 163

		PAGE
Turner *v.* Rookes	10 Ad. & E. 47; 50 R. R. 320	665
Tweddle *v.* Atkinson	1 B. & S. 393	308
Twycross *v.* Grant	2 C. P. D. 469	635
Tyson *v.* Smith	9 Ad. & E. 406; 48 R. R. 539	320, 536

U.

Underwood, Son & Piper *v.* Lewis	[1894] 2 Q. B. 306	668
Union Lighterage Company *v.* London Graving Dock Company	[1902] 2 Ch. 557	17

V.

Vanderhaege, In re	20 Q. B. D. 146	360

W.

Walker, In re	2 Manson, 60	61
Walker, Hunter & Co. *v.* Falkirk Iron Company	4 Rep. Pat. Cas. 390.	586
Wall *v.* London and Northern Assets Corporation	[1898] 2 Ch. 469	280, 599
Wallace *v.* Smith	5 East, 115	453
Wallis, In re	[1902] 1 K. B. 719	392
Ward *v.* Duncombe	[1893] A. C. 369	385
—— *v.* Sittingbourne and Sheerness Railway Company	L. R. 9 Ch. 488	200
Wasdale, In re	[1899] 1 Ch. 163	391
Watts *v.* Bucknall	[1902] 2 Ch. 628; [1903] 1 Ch. 766	635
—— *v.* Symes	1 D. M. & G. 240	476
Webb *v.* Kelly	9 Sim. 469; 47 R. R. 288	700
Webster, In re	27 Ch. D. 710	467
—— *v.* Webster	31 Beav. 393.	390
Wedgwood Company, In re	May 19, 1884	2
Wells, In re	8 Beav. 416; 68 R. R. 132	155
——, In re	43 Ch. D. 281	690
Welton *v.* Saffery	[1897] A. C. 299	113
Wenlock (Baroness) *v.* River Dee Company	19 Q. B. D. 155	242
Wentworth *v.* Wentworth	[1900] A. C. 163	8
West *v.* Knight	1 Ch. Ca. 134	646
West Ham Corporation *v.* Grant	40 Ch. D. 331	227
West Ham Union *v.* Pearson	62 L. T. 638; 54 J. P. 645	466
—— *v.* St. Matthew, Bethnal Green (Churchwardens of)	[1896] A. C. 477	457
Western Counties Steam Bakeries and Milling Company, In re	May 4, 1896	2
Wheeldon *v.* Burrows	12 Ch. D. 31.	17
Whiston's Settlement, In re	[1894] 1 Ch. 661	487, 750
Whitbread & Co. *v.* Watt	[1902] 1 Ch. 835	94
Whiteford, In re	[1903] 1 Ch. 889	8
Whittick *v.* Mozley	1 Cab. & E. 86	343
Wickham *v.* Hawker	7 M. & W. 63; 56 R. R. 623	432
Willes *v.* Greenhill	4 D. F. & J. 147	409
Williams, In re	[1904] 1 Ch. 52	776

		PAGE
Williams *v.* Bagnall	15 W. R. 272	432
——— *v.* Kershaw	5 L. J. (N.S.) (Ch.) 84; 5 Cl. & F. 111, n.; 42 R. R. 269.	356
Williamson *v.* Naylor	3 Y. & C. Ex. 208	32
Wills *v.* Stradling	3 Ves. 378; 4 R. R. 26	341
Wilson *v.* Dennison	Amb. 82	645
Wimbledon and Putney Commons Conservators *v.* Dixon	1 Ch. D. 362	539
Winfield & Son *v.* Snow Brothers	8 Rep. Pat. Cas. 15	585
Woodin, In re	[1895] 2 Ch. 309	690
Wragg, Limited, In re	[1897] 1 Ch. 796	111
Wrexham, Mold and Connah's Quay Railway Company, In re	[1899] 1 Ch. 440	242
Wright *v.* Wilkin	10 W. R. 403	779
Wyatt, In re	[1892] 1 Ch. 188	390
Wyman *v.* Paterson	[1900] A. C. 271	9
Wynch *v.* Wynch	1 Cox, 433	693
Wyndham *v.* Wyndham	3 Bro. C. C. 58	690

X.

X., In re	[1894] 2 Ch. 415	337

Y.

Yates *v.* Cox	17 W. R. 20	390
Ydun, The	[1899] P. 236	454

Z.

Zetland (Earl of) *v.* Lord Advocate	3 App. Cas. 505	304

CASES

DETERMINED BY THE

CHANCERY DIVISION

AND IN

LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

In re STRAND WOOD COMPANY, LIMITED.

C. A. 1904 ~~ *June* 1.

[00102 of 1904.]

Company—Winding-up—Practice—Security for Costs—Misfeasance Summons —Companies (Winding-up) Act, 1890 (53 & 54 *Vict. c.* 63), *s.* 10.

It is not the practice of the Court to require a liquidator on the ground of poverty to give security for the costs of a misfeasance summons.

APPEAL from an order of Mr. Registrar Hood.

In 1902 the Strand Wood Company, Limited, went into voluntary liquidation for the purposes of reconstruction, and Mr. Harry Wren was appointed liquidator in the winding-up. The assets and undertaking of the company were to be transferred to a new company subsequently incorporated under the name of the Murman Coast Company, Limited, upon the terms of an agreement whereby the new company undertook as part of the consideration for the transfer to satisfy the debts and liabilities of the old company, and to keep the old company, its liquidator and contributories, indemnified against all proceedings in respect thereof, and also to pay and keep the old company, its liquidator and contributories, indemnified against the costs and expenses of and incident to the winding-up.

On April 19, 1904, the liquidator took out a misfeasance summons under s. 10 of the Companies Act, 1890, against

C. A. 1904

STRAND WOOD COMPANY, LIMITED, *In re.*

certain officers of the old company. Two of the respondents to this summons were Messrs. C. & H. J. Gane. The claims against these respondents amounted in the aggregate to some 15,000*l.*, besides a further unascertained sum, and the alleged misfeasances extended over a number of years.

On April 28 the Messrs. Gane took out a summons asking that the liquidator might be ordered to give security for their costs of the misfeasance summons. The ground of the application was that the liquidator was a person of no financial position. Mr. Registrar Hood declined to order the liquidator to give security.

The Messrs. Gane appealed.

Jessel, for the appellants. The Court has jurisdiction in a proper case to order a liquidator to give security for the costs of a misfeasance summons. In *In re W. Powell & Sons* (1) Romer J. assumed that there was jurisdiction to make the order, and though he declined to order security to be given in that case, the sole ground of his refusal was that the Court at the hearing of the summons might order the liquidator to pay the costs personally; and he also thought that in determining that question regard ought to be had to the fact that the liquidator had opposed the application for security. That view has since been acted on by Stirling J. in *In re Western Counties Steam Bakeries and Milling Co.* (2): see Palmer's Company Precedents, 9th ed. Pt. II. pp. 632–3.

[ROMER L.J. The principle of *Cowell* v. *Taylor* (3) is opposed to your contention.]

In *In re W. Powell & Sons* (1) it was argued that the Court had no jurisdiction to order a liquidator to give security; but your Lordship did not so hold.

[ROMER L.J. It appears to me now, though it did not occur to me at the time, that I might have based my decision upon a higher ground—namely, want of jurisdiction.]

Pearson J. ordered a liquidator to give security for the costs of a misfeasance summons in *In re Wedgwood Co.* (4); and

(1) [1896] 1 Ch. 681.
(2) May 4, 1896.
(3) (1885) 31 Ch. D. 34.
(4) May 19, 1884.

Bacon V.-C. made a similar order in *In re Seventh East Central Building Society.* (1)

[ROMER L.J. As at present advised, I cannot assent to that decision.]

In this case the liquidator is a mere shadow, and the company on behalf of which he is nominally putting forward his claim will get no benefit by it, since it has sold its undertaking to another company. That brings this case within the exception stated by Bowen L.J. in *Cowell* v. *Taylor.* (2)

A liquidator who takes out a misfeasance summons is in the same position as a plaintiff company under s. 69 of the Companies Act, 1862; and that section applies by analogy.

Romer, for the liquidator.

VAUGHAN WILLIAMS L.J. I am afraid that the practice of the Court is against the appellants and the appeal fails. I wish to say for myself that I personally, while acting as the judge in company matters, have seen many instances of an abuse of the present state of the law, and if this were a new matter I should not be sorry if the Court had power to order security in cases in which it thought that the circumstances were such that security ought to be ordered. The authorities are, however, too strong for me, and we must be content with the practice as it stands.

ROMER L.J. I also think that this appeal ought to be dismissed. The liquidator is coming here under a power expressly conferred upon him by Act of Parliament and in the exercise of his statutory duties. It is not suggested that these proceedings by the liquidator are frivolous or improperly taken, and in that state of things, according to the practice of this Court, the liquidator is not bound to give security for costs.

COZENS-HARDY L.J. I agree. I think it clear that this case does not come within s. 69 of the Companies Act, 1862. This is not a case of an action by the company; but it is argued that by analogy, where the liquidator comes to the Court under the express provisions of s. 10 of the Companies Act,

(1) (1884) 51 L. T. 109. (2) 31 Ch. D. 34, 38.

C. A. 1904 STRAND WOOD COMPANY, LIMITED, *In re.* Cozens-Hardy L.J.

1890, we ought to treat him as being in the same position as a plaintiff company. I cannot follow that. The general rule is settled by *Cowell* v. *Taylor* (1) and other cases. It seems to me that we should be going contrary to authority if we required the liquidator to give security for costs in this case. I desire to emphasize what was said by Romer J. in *In re W. Powell & Sons* (2), that the Court will not have the slightest hesitation in making a personal order for costs against the liquidator on a misfeasance summons if the circumstances require it.

Solicitors: *Arthur J. Benjamin; Bisgood & Marshall.*

H. B. H.

KEKEWICH J. 1904 *Jan.* 15, 19.

In re WOODS. GABELLINI *v.* WOODS.

[1903 W. 2070.]

Tenant for Life and Remainderman—Capital or Income—Will—Conversion—Postponement of Conversion—Wasting Property—Mining Royalties—Rate of Interest—Income of invested Surplus.

Interest at 3, and not at 4, per cent. must at the present day be computed in applying the principle of *Brown* v. *Gellatly*, (1867) L. R. 2 Ch. 751, whereby, when wasting securities, forming part of the residuary estate of a testator given upon trust for conversion, are retained under a power to postpone conversion, the tenant for life is entitled during the period of postponement to interest on the value of the securities.

In re Lynch Blosse, [1899] W. N. 27 (8), followed.

Where, in such a case, the interest at 3 per cent. is paid out of the actual income of the wasting securities to the tenant for life, and the balance is invested as capital of the estate, the tenant for life is entitled to the income of the invested fund.

ADJOURNED SUMMONS.

The testator, Matthew Charles Woods, by his will dated May 1, 1893, devised and bequeathed all his residuary real and personal estate to James Edward Woods, Robert Pybus, Charles Cowell, and Claude Charles Edward Woods upon trust to sell, call in, and convert the same into money, and to

(1) 31 Ch. D. 34. (2) [1896] 1 Ch. 681.

pay thereout his funeral and testamentary expenses and his debts and legacies, and to stand possessed of the residue of the moneys (thereinafter called the residuary trust funds) as to one equal third part thereof upon trust for his son the said Claude C. E. Woods absolutely, and as to one other equal third part thereof upon trust to invest the same as therein mentioned, and to stand possessed of such third part and the investments for the time being representing the same upon trust to pay the annual income and proceeds thereof to his daughter Mildred Sybella Mary Gabellini during her life for her separate use during coverture and so that she should be restrained from anticipating the same whether under coverture or not, and from and after her death the testator directed the trustees to stand possessed of such third part as well the capital as the income thereof upon certain trusts for her child or children, and in case there should be no such child then in trust for the testator's son Claude C. E. Woods and his daughter Lucy Eva Annie Woods in equal shares as therein mentioned, the share of the said Lucy E. A. Woods to be subject to the trusts and provisions thereby declared concerning her original share under the will, and the testator directed his trustees to hold one other third part of the residuary trust funds upon the like trusts on behalf of his daughter Lucy E. A. Woods and her issue to those declared on behalf of his daughter Mildred S. M. Gabellini and her issue, and subject to the like provision (in default of issue) for accrual for the benefit of Claude C. E. Woods and Mildred S. M. Gabellini as (mutatis mutandis) were therein declared in the case of the share of Mildred S. M. Gabellini. The testator further directed that the trustees might postpone the sale and conversion of any part of his real and personal estate for so long as they should think fit, notwithstanding that the same might be of leasehold tenure or otherwise of a wearing out or perishable nature, and might retain any part of his estate in the same state of investment as the same might be in at his death, however hazardous the nature thereof might be, and, as regarded any real or leasehold property remaining unsold, he gave his trustees power to manage the property according to their absolute discretion. He conferred on his trustees wide powers of investment,

KEKEWICH J.

1904

WOODS, *In re.* GABELLINI *v.* WOODS.

extending (inter alia) to investments in the ordinary shares of railway companies.

The testator died on July 20, 1894, and his will, and a codicil thereto dated May 5, 1894, which is not material for the present purpose, were duly proved on December 22, 1894.

The estate of the testator included certain shares of the estate of one George Hutton Wilkinson, deceased, which comprised mining property. This property was under lease to lessees who worked the coal and minerals and paid surface, way-leave, and other rents, and also mining royalties, with a minimum or fixed rent in respect of such working.

The trustees of the testator's will, in the exercise of the discretion conferred on them, refrained from converting this mining property and retained the same as an investment, and they received periodically from the trustees of the Wilkinson estate sums of money as the share of the testator's estate in the mining rents and royalties.

Questions having arisen as to the manner in which the moneys so received ought to be dealt with, an originating summons was taken out by the two tenants for life, Mildred S. M. Gabellini and Lucy E. A. Woods, as plaintiffs, against the trustees James E. Woods, Robert Pybus, Charles Cowell, and Claude C. E. Woods as defendants, for the determination (inter alia) of the questions whether according to the true construction of the will each of the applicants was entitled for her life or until conversion to (*a*) one-third of the rents, royalties, and income arising from the unconverted interest of the testator in the residuary estate of George Hutton Wilkinson, deceased, or alternatively (*b*) to 4 per cent. per annum on one-third of the estimated capital value as at the date of the death of the testator Matthew Charles Woods of the testator's interest in the residuary estate of George Hutton Wilkinson, or alternatively (*c*) to one-third of the rents other than mining royalties arising from such unconverted interest, and to 4 per cent. per annum on one-third of the estimated capital value at such date of the mines and minerals within and under the lands forming part of such unconverted interest.

Upon the hearing of the summons it was agreed that the second of the above alternatives ought to be adopted, and that

the case was governed by the principle of *Brown* v. *Gellatly* (1), where it was held, under a will similar in terms to that in the present case, that the tenants for life were not entitled to the earnings of ships forming part of the testator's residuary estate, but were entitled to interest at 4 per cent. on the value of the ships from the testator's death; and the only question now argued was whether in applying that principle interest ought to be computed at the rate of 4 per cent. or of 3 per cent.

Whinney, for the plaintiffs. It is submitted that the rate of interest ought to be 4 per cent. The rate of 3 per cent. has in recent times been adopted only in three classes of cases—namely, first, when a lump sum is to be apportioned between tenant for life and remainderman; secondly, when children have to bring advances into hotchpot; and, thirdly, when trustees are visited with the consequences of an innocent breach of trust. The principle of *Brown* v. *Gellatly* (1) rests on a different footing. In cases of that kind there is a wasting security producing annual income greater than 4 per cent., which is properly retained by the trustees; there is no capital sum on which it can be said that the tenant for life is to receive interest; and the Court, applying the analogy of the decision in *Howe* v. *Earl of Dartmouth* (2), holds that it is not right to allow the tenant for life to receive the whole of the large income which the security produces. But where the security is of a hazardous or uncertain character the tenant for life has to bear the risk of loss as well as the remainderman, and it is right that the rate of interest should be fixed accordingly. In *Gibson* v. *Bott* (3), where the property was leasehold, the rate of interest taken was 4 per cent. So in *Caldecott* v. *Caldecott* (4), where the property was farming stock; and in *Dimes* v. *Scott* (5), which is the leading authority where there is a direction to convert, and trustees fail to do so. So also in *Meyer* v. *Simonsen* (6), which is more directly in point,

(1) L. R. 2 Ch. 751.
(2) (1802) 7 Ves. 137; 6 R. R. 96; 1 W. & T. 7th ed. 68.
(3) (1802) 7 Ves. 89, 95; 6 R. R. 87.
(4) (1842) 1 Y. & C. Ch. 312; 57 R. R. 345.
(5) (1827) 4 Russ. 195; 28 R. R. 46.
(6) (1852) 5 De G. & Sm. 723.

KEKEWICH J.
1904
WOODS, *In re.*
GABELLINI *v.* WOODS.

and which was followed in *Brown* v. *Gellatly* (1); and so, again, in *In re Earl of Chesterfield's Trusts* (2), following *Beavan* v. *Beavan*. (3) The question of reducing the rate of interest to 3 per cent. was first raised before your Lordship in *In re Eaton* (4); but 4 per cent. was adhered to. Again in *In re Nicholson* (5) 4 per cent. was adhered to by your Lordship, but with an intimation that the rule might require alteration. Later in *In re Goodenough* (6), a case falling within the principle of *In re Earl of Chesterfield's Trusts* (2), and in *In re Duke of Cleveland's Estate* (7), the rate of 3 per cent. in lieu of 4 per cent. was directed by your Lordship to be taken. In *In re Lambert* (8) Stirling J. held that 3 per cent. and not 4 per cent. interest ought to be charged on advances brought into hotchpot. In *In re Hargreaves* (9) Joyce J. thought that no general rule was intended to be laid down in *In re Lambert* (8); but that view was negatived by the more recent decision of *In re Whiteford* (10), and it must therefore, it is conceived, be taken that in cases of that description 3 per cent. will be the rate in future. It is to be observed that in cases governed by *In re Earl of Chesterfield's Trusts* (2) compound interest is calculated, and the tenant for life, it is submitted, gets more than he would under the principle of *Brown* v. *Gellatly* (1), if only 3 per cent. interest were computed. *Wentworth* v. *Wentworth* (11) is a case almost exactly similar to the present case, and there Lord Macnaghten (12) refers to 4 per cent. as being the rate which is taken in cases of that kind. It is further to be observed that under the powers of investment in this will it would be competent for the trustees to invest in the shares of railway companies, and at present prices the shares of some of the best companies would yield considerably more than 3 per cent., and not very much less than 4 per cent. [He referred also to

(1) L. R. 2 Ch. 751.
(2) (1883) 24 Ch. D. 643.
(3) (1869) 24 Ch. D. 649, n.
(4) [1894] W. N. 95.
(5) [1895] W. N. 106.
(6) [1895] 2 Ch. 537.
(7) [1895] 2 Ch. 542.
(8) [1897] 2 Ch. 169.
(9) (1902) 86 L. T. 43.
(10) [1903] 1 Ch. 889, 895.
(11) [1900] A. C. 163.
(12) Ibid. 171.

Taylor v. *Clark* (1), *In re Morley* (2), *In re Hill* (3), *Wyman* v. *Paterson* (4), and *Rowlls* v. *Bebb*. (5)]

O. L. Clare, for the defendant Claude C. E. Woods, entitled in remainder. It is submitted that the rate of interest ought to be 3 per cent. The recent case of *In re Lynch Blosse* (6) seems to be exactly in point. There, in a case substantially similar to the present case, the trustees of a will had retained certain investments and paid the whole income to the tenant for life, and Stirling J. held that the retained investments must be valued as at the end of a year from the testator's death, and that, as to the past, interest at the rate of 4 per cent. on that value ought to be allowed to the tenant for life, but, as to the future, interest was to be at the rate of 3 per cent. There are two classes of cases where investments are not in the condition in which, as between tenant for life of residue and remainderman, they were intended by the testator to be—namely, first, where the securities are of a wasting character; and, secondly, where they are reversionary. If 3 per cent. is the right rate in the one class, it must be so also in the other; and it has been clearly settled by *Rowlls* v. *Bebb* (5) that in the latter class of cases the rate is to be 3 per cent. [He referred also to *London, Chatham and Dover Ry. Co.* v. *South Eastern Ry. Co.* (7)]

Christopher James, for the trustees.

KEKEWICH J. The question what rate of interest ought to be allowed in certain cases has exercised the minds of judges in recent years, but unfortunately there is not at present any definite rule which guides the Court. The cases in which the question arises differ so much from one another that it does not follow that because a particular rate of interest is adopted in one case it ought also to be adopted in another. The question has most often arisen in cases of the class commonly referred to under the name of *In re Earl of Chesterfield's Trusts* (8), that

(1) (1841) 1 Hare, 161.
(2) [1895] 2 Ch. 738.
(3) (1881) 50 L. J. (Ch.) 551; 45 L. T. 126.
(4) [1900] A. C. 271.
(5) [1900] 2 Ch. 107.
(6) [1899] W. N. 27 (8).
(7) [1892] 1 Ch. 120; [1893] A. C. 429.
(8) 24 Ch. D. 643.

KEKEWICH J.
1904
WOODS, *In re.*
GABELLINI *v.* WOODS.

being the case reported before Chitty J. in which he adopted a previous decision in *Beavan* v. *Beavan* (1), and the whole law was settled by the judgment in *Turner* v. *Newport.* (2) A case of that class came before the Court of Appeal in *Rowlls* v. *Bebb* (3), and Lindley M.R. said this: "The only other question is, whether interest should be calculated at 3 per cent. or at 4 per cent. I have not looked at the Judgments Act" (1 & 2 Vict. c. 110), "but I think I am right in saying that it provides that a judgment debt shall bear interest at 4 per cent. Of course, we cannot alter that. And I think the Rules provide that legacies shall bear interest at 4 per cent. But I know of no rule which applies in terms to such a case as this, or even to the making good of breaches of trust. Having regard to the rate of interest which can now be obtained on securities upon which trustees may invest, it appears to me that in a case of this kind, even apart from the view taken by Kekewich J. in *In re Goodenough* (4), that 3 per cent., not 4, ought to be the rate of interest." That is not only a very strong expression of the opinion of the late Master of the Rolls and of the Court of Appeal that 3 per cent. ought to be substituted for 4 per cent. in that particular class of cases, but it is an intimation in pretty clear language that the substitution ought to be made in cases where no statute or rule interferes to prevent it. That view seems to me to be founded on good sense for this reason: Mr. Whinney referred, among his earlier cases, to *Gibson* v. *Bott* (5), decided by Lord Eldon in 1802. In that case the rate of interest was 4 per cent., and if it was fair and right to give 4 per cent. then, it does not seem to me to be possible to give that rate now. And the same may, I think, be said of the later date in 1867, when *Brown* v. *Gellatly* (6) was decided. Since then the rate of interest has fallen enormously. The present is perhaps an unhappy moment at which to discuss the matter, because during the last few months there has been a very large fall in the prices of first-class securities, with the result that it is now possible to purchase first-class trust

(1) 24 Ch. D. 649, n.
(2) (1846) 2 Ph. 14.
(3) [1900] 2 Ch. 117.
(4) [1895] 2 Ch. 537.
(5) 7 Ves. 89, 95; 6 R. R. 87.
(6) L. R. 2 Ch. 751.

securities so as to realize a much higher rate of interest than was previously possible; and no doubt many of the more recent cases were decided when trust securities stood much higher, and the rate of interest obtainable was proportionately lower. But it would not be right that the decisions of the Court should vary from day to day, month to month, or year to year because the prices of securities fluctuate. I come back, therefore, to the rate of 4 per cent., which was adopted by the Court in *Gibson* v. *Bott* (1) and in *Brown* v. *Gellatly*. (2) Common sense requires that some lesser rate should now be taken I am bound to ascertain in the first place whether any such rule is applicable as exists in the case of judgments or in administration actions, any rule laid down by statute or the Rules of Court, or to be gathered from decisions following one another and constituting the unwritten law of the Court. I do not think there is. The nearest approach to it is a passage in the judgment delivered in the Privy Council in the case of *Wentworth* v. *Wentworth*. (3) There, no doubt, Lord Macnaghten says that "in this country, in the case of income-producing property directed by will to be converted, but retained for a time unconverted for the benefit of the estate, it has been the practice of the Court to put a value on the property, and to allow the tenant for life out of the income actually produced a sum equal to 4 per cent. on such value." But there the question was not as to the rate of interest, but only as to what was equitable as between tenant for life and remainderman. It does not seem to me to be an authority on the point at all. The case I have to deal with is this. The testator was entitled to mining royalties, a security of a wasting character and producing large profits. He directed that his property should be sold, and settled the proceeds of sale, but gave to the trustees large powers of postponement. It is admitted by all parties that the trustees acted rightly in exercising those powers, and retaining this property in specie. Unfortunately there is no direction in the will as to payment of royalties until sale to the tenants for life nor as to any

(1) 7 Ves. 89, 95; 6 R. R. 87. (2) L. R. 2 Ch. 751.
(3) [1900] A. C. 163, 171.

KEKEWICH J.
1904
WOODS, *In re.*
GABELLINI *v.* WOODS.

apportionment. The result is that by the terms of the will the trustees were not bound to pay the tenants for life anything. It has been decided in *Brown* v. *Gellatly* (1) and in other cases that the proper thing to do in a case of this kind is to value the securities as at the time when they ought to have been converted—that is to say, immediately after the testator's death, if he has so directed, or at the expiration of a year from his death if he has given no direction, and taking the value at that time, to give the tenant for life interest on that value in lieu of profits or royalties, so that he may have such a proportion as is equivalent to the value of his interest. That is what has been called in many cases a notional conversion. It must necessarily be an estimate. The Court has to find out, as best it can, the value of the mining property, having regard to the duration of the leases and all the circumstances of the case. Then the question arises how the rate of interest is to be fixed. The Court must do what is fair and right as between tenant for life and remainderman. The tenant for life was not intended to have the whole of the royalties; the remainderman was not intended to have the whole of the proceeds of sale. Something, therefore, in the nature of compensation must be paid to the tenant for life in the interval. It does not appear how any judge arrived at 4 per cent. or any other rate, unless it were because, if the conversion had in fact been made and the money well invested, it would, according to the prices of the day, have realized 4 per cent. The judge might have worked out the notional conversion by saying that if so much were laid out in one investment and so much in another, 4 per cent. would be obtained. But the judges have not done that; they have struck a line; they have said in effect: "Invest this in trust securities, and you will be fortunate if you get 4 per cent." If that be the principle, it seems to me that nowadays one would say: "Invest this in trust securities, and you will be as fortunate if you get 3 per cent. as you would have been in 1874 with 4 per cent." There is no recent case, so far as I know, coming within the principle of *Brown* v. *Gellatly* (1) except the case of *In re Lynch Blosse* (2) before Stirling J. That seems to me to hit the

(1) L. R. 2 Ch. 751. (2) [1899] W. N. 27 (8).

point exactly. There the judge had to decide, not only what should be allowed in the future, but also what should be allowed for the past. That was matter for his judicial discretion. He allowed 4 per cent. for the past, but with regard to the future he took a different line entirely, and allowed only 3 per cent., because no more than 3 per cent. would be obtained if there were a notional conversion instead of an actual conversion. I do not find here that I am hampered by any of the cases. They seem to me to point to an alteration of the old rate where no statute or rule prevents alteration. All the authority I have, with the exception of the dictum of Lord Macnaghten, which, I think, I have satisfactorily explained, points in that direction. I think I am bound to say that in cases under the principle of *Brown* v. *Gellatly* (1), as in other cases, 3 per cent. should now take the place of 4 per cent. I say nothing about special cases, as where there has been an innocent breach of trust. Cases of that kind must be dealt with in an entirely different way. I am dealing with a case as between those entitled to corpus and those entitled to income. I am encouraged in the view I take by knowing that in actuarial valuations at the present day 3 per cent. is taken as the present rate of interest.

Jan. 19. A further question was now raised, namely, whether the tenants for life, in addition to receiving interest at the rate of 3 per cent. as above mentioned, were entitled to the income arising from the balances of the mining rents and royalties from time to time invested and forming part of the capital of the estate.

Whinney, for the plaintiffs, the tenants for life, submitted that they were so entitled. [He referred to *Meyer* v. *Simonsen*. (2)]

O. L. Clare, for the defendant Claude C. E. Woods. The tenants for life are not entitled to anything more than the interest at 3 per cent. calculated on the value ascertained at the testator's death, according to the principle of *Brown* v. *Gellatly*. (1) The point is a very simple one. The tenants for

(1) L. R. 2 Ch. 751. (2) 5 De G. & Sm. 723.

KEKEWICH J.
1904
WOODS, *In re.* GABELLINI *v.* WOODS.

life are not entitled to the whole profits of the wasting property as income, and there are only two ways of proceeding, one, by realization, the other by letting the property work itself out. If the property were sold it would realize a particular sum of money; the tenants for life are to receive interest on that sum until the property is worked out: that is income; all the rest is capital. On the contrary contention, the tenants for life would receive income varying in amount from year to year. In *Wentworth* v. *Wentworth* (1), which is exactly this case, Lord Macnaghten said that the tenants for life of the settled shares were to receive out of the rents and royalties "such an annual sum as in the opinion of the Court would, under all the circumstances of the case, be a fair equivalent for the annual income that would have been received by them" if the residuary estate had been sold on the specified date and the proceeds of sale invested. It is manifest that the "fair equivalent" is to be ascertained once for all. They are to have nothing more than that, because they are put into the same position, as nearly as may be, as if the property were realized. *Meyer* v. *Simonsen* (2) was a different case. The testator had been in partnership, and his former partner owed the estate a large sum of money which was payable by instalments with interest at 5 per cent., and the Vice-Chancellor gave the tenant for life 4 per cent. and directed 1 per cent. to be invested, and gave the tenant for life interest on that 1 per cent. That case, therefore, was special, and moreover the tenant for life only received interest in respect of the actual value as and when received by the trustees.

Whinney, in reply. In *Brown* v. *Gellatly* (3) and *Wentworth* v. *Wentworth* (1) the Courts expressly followed *Meyer* v. *Simonsen*. (2) In *Wentworth* v. *Wentworth* (1) it was expressly directed that the residue of the rents and royalties formed "part of the capital of the residuary estate, and ought to be distributed and invested accordingly." If so, the income would necessarily be payable to the tenant for life. It would be unfair that the tenant for life should only receive 3 per cent.,

(1) [1900] A. C. 163, 172. (2) 5 De G. & Sm. 723.
(3) L. R. 2 Ch. 751.

unless the valuation is taken on a similar basis. It is believed that valuers of collieries proceed on a 5 per cent. basis. The 3 per cent. is merely income pending realization, the equivalent of what would have been received if the realization had been effected. [He referred also to *In re Eaton* (1) and *In re Hill's Settlement Trusts.* (2)]

KEKEWICH J. In this case there is a notional conversion—that is to say, mining royalties have been directed to be valued as at the death of the testator, and a certain sum being ascertained in that way, the tenant for life will receive as income interest at 3 per cent. on the sum so ascertained. That will be paid out of the mining royalties, leaving a large balance, and the balance will be invested by the trustees as capital of the testator's estate. About that there is no question, but the question which is now raised is how ought the income of the invested fund to be dealt with. On the one hand it is contended that it ought to be treated as capital; on the other hand it is said that it is income of the testator's estate, and therefore payable to the tenant for life. It is strange that the exact point does not seem to have been neatly and clearly decided in any case. In the first place I have to consider whether, where a wasting security forms part of a testator's residuary estate so that the rule which is generally known as that in *Howe* v. *Earl of Dartmouth* (3) applies, any distinction is to be drawn between the case where the testator has directed conversion and the case where he has been silent on the subject. It seems to me that no logical distinction can be drawn between the two cases. Here I have both together. The testator has settled mining royalties, a wasting security, which would have had to be realized under the rule in *Howe* v. *Earl of Dartmouth* (3) if the testator had not so directed. It is perfectly competent to a testator either to leave the Court to act under the rule or to direct conversion himself, and whichever is done it comes to this: there is property which ought to be converted; it cannot, as is agreed by all, be immediately converted; the tenant for

(1) (1894) 70 L. T. 761.
(2) (1896) 75 L. T. 477.
(3) 7 Ves. 137; 6 R. R. 96; 1 W. & T. 7th ed. 68.

KEKEWICH J.

1904

WOODS, *In re.* GABELLINI *v.* WOODS.

life must not be wholly disappointed, and therefore it is necessary to ascertain what is called in *Wentworth* v. *Wentworth* (1) the "fair equivalent" which he ought to receive. That can only be done by valuing the estate, and then giving the tenant for life interest at a certain rate on the amount. Is that intended to be the whole that the tenant for life is to receive? If there had been an actual conversion the tenant for life would have been entitled to the income of the whole. Is there not, in substance, a conversion from year to year? Is not the balance of the mining royalties, which the tenant for life does not receive, the proceeds of realization at once of a part of the estate? Do not the trustees receive year by year some part of the capital of the estate? If that is so, it goes as capital to be invested, and I see no reason in law why the tenant for life is not entitled to the income of it. The authorities seem to me to be in favour of giving the tenant for life this advantage. *Brown* v. *Gellatly* (2) was expressly decided on the authority of *Meyer* v. *Simonsen* (3), and in *Meyer* v. *Simonsen* (3) the tenant for life did get interest on the invested surplus, and in *Wentworth* v. *Wentworth* (1) I think the same result follows from the judgment of the Privy Council. The will is set out on pp. 168, 169 of the report. The testator had directed an accumulation for twenty-one years, and that accumulation stood. The question arose as to what was to happen after that period, and their Lordships held that there must be a notional conversion in order to find out what was the "fair equivalent" to be paid to the tenant for life, and then they directed that the balance of the rents and royalties formed "part of the capital of the residuary estate, and ought to be distributed and invested accordingly." They were not construing the rest of the will, but were only adjudicating on the one question before them, and they left the division of the rest to the persons to whom it was by law entrusted. According to that, if the tenant for life was entitled to the income of the residuary estate he would receive the income of the invested surplus. There was no occasion for the Privy Council to give any directions

(1) [1900] A. C. 163, 172. (2) L. R. 2 Ch. 751.
(3) 5 De G. & Sm. 723.

on the point, and they did not do so. All they said was that something must go into residue. If it goes into residue, it seems to me that the tenant for life will receive the income of it according to the directions in the will. That is in no way inconsistent with the judgment of the Privy Council. I hold, therefore, that the tenants for life will be entitled to receive the income of these invested moneys.

Solicitors for plaintiffs: *Markby, Stewart & Co.*

Solicitors for defendants: *Stibbard, Gibson & Co., for Gibson, Pybus & Pybus, Newcastle-upon-Tyne.*

C. C. M. D.

RAY *v.* HAZELDINE.

[1902 R. 2138.]

Easement of Necessity—Light—Grant of one of two adjoining Tenements—Derogation from Grant—Implied Reservation.

The defendant, being the owner of two adjoining tenements, granted one of them to the plaintiff's predecessor in title, while retaining the other, without expressly reserving to himself any rights over the tenement granted. The plaintiff built a wall on her premises so as to block out the light to two windows in the defendant's premises. One of these windows lighted a pantry which could not be lighted in any other way except by means of borrowed light, and the obstruction rendered the pantry useless as a pantry:—

Held, that there was no implied reservation to the defendant of the right to the access of light to the pantry window, inasmuch as it was not an easement of necessity within the exception to the rule in *Wheeldon* v. *Burrows*, (1879) 12 Ch. D. 31.

The principle of *Union Lighterage Co.* v. *London Graving Dock Co.*, [1902] 2 Ch. 557, applied.

Prior to the date of the indenture next hereinafter mentioned, the defendant was the owner in fee simple of two adjacent houses in Cheadle Hulme, Cheshire. By an indenture dated October 18, 1895, the defendant conveyed one of these houses to the plaintiff's husband in fee simple, and this house was subsequently conveyed by him to the plaintiff. In the western wall of the house retained by the defendant there were

KEKEWICH J. 1904 RAY v. HAZELDINE.

two windows overlooking a yard forming part of the plaintiff's premises. Neither of the windows was an ancient light, nor was any right to light in respect of either of the windows reserved in favour of the defendant by the indenture of October 18, 1895.

The plaintiff recently commenced to erect a wall in her yard close to these windows, so as completely to block the access of light thereto; but the defendant knocked down the wall from his own premises, and it was again erected and knocked down.

The plaintiff brought this action for a declaration that she was entitled to build on her premises so as to obstruct the light to the two windows in question, and for an injunction to restrain the defendant from throwing down the wall, and for damages.

The defendant pleaded that the access of light to these two windows was absolutely necessary for the enjoyment and use for habitation of the part of his house which was lighted by these windows. Of these two windows one lighted a pantry and the other lighted a landing immediately over the pantry. The evidence shewed that the landing could be lighted by making a skylight in the roof, and that the pantry could be lighted by making a window into the scullery which adjoined the pantry, thus obtaining a borrowed light through the scullery; but it was admitted in cross-examination by the plaintiff's surveyor that the blocking up of the existing window would render the pantry useless as a pantry.

Stewart-Smith, *K.C.*, and *The Hon. F. Russell*, for the plaintiff. Two rules are laid down by the Court of Appeal in *Wheeldon* v. *Burrows* (1): 1. That upon the grant of one of two tenements held by a common owner there is an implied grant of such easements as are necessary to the reasonable enjoyment of the property conveyed and have in fact been enjoyed during the unity of ownership. 2. That if the grantor intends to reserve any right over the tenement granted, he must reserve it expressly in the grant. This second rule is subject to certain exceptions, including the well-known excep-

(1) 12 Ch. D. 31, 49, 59.

tion in the case of an easement of necessity. But to constitute an easement of necessity it is not enough to shew that the easement is reasonably necessary to the enjoyment of the property retained; it must be shewn that that property cannot be used at all without the easement: *Union Lighterage Co.* v. *London Graving Dock Co.* (1), per Stirling L.J.; and, as the Lord Justice proceeds to point out, the lights which were the subject of decision in *Wheeldon* v. *Burrows* (2) were certainly reasonably necessary to the enjoyment of the property retained, which was a workshop, yet there was held to be no reservation of them. The right to light claimed by the defendant is not an easement of necessity within the definition above stated.

P. O. Lawrence, K.C., and *T. T. Methold*, for the defendant. In *Wheeldon* v. *Burrows* (3) it was held that the windows in the particular position in which they existed at the time of the grant of the adjoining property were not necessary to the full enjoyment of the workshop. The test is whether this property can be enjoyed in the state in which it is if the plaintiff's obstruction is allowed to remain. Stirling L.J. does not mean that the whole property is to be rendered useless before any reservation can be implied; he is referring to the particular part of the property which is affected.

[They also referred to *Nicholas* v. *Chamberlain*. (4)]

KEKEWICH J. If a vendor of land desires to reserve any right in the nature of an easement for the benefit of his adjacent land which he is not parting with, he must do it by express words in the deed of conveyance. That is settled law, and expresses the result of the decision in *Wheeldon* v. *Burrows* (2), where the Court of Appeal affirmed the decision of Bacon V.-C. That is the general rule, but the rule is subject to certain exceptions. One of them is the well-known exception of an easement of necessity—that is to say, where the enjoyment of the alleged right over the adjoining land is necessary to the property which is not conveyed, then the Court will consider the easement as impliedly reserved, though

(1) [1902] 2 Ch. 557, 573.
(2) 12 Ch. D. 31.
(3) 12 Ch. D. 45.
(4) (1607) Cro. Jac. 121.

KEKEWICH J.
1904
RAY v. HAZELDINE.

it has not been reserved by express words. Such easement, or right in the character of an easement, may be a right to the access of light to a particular window. In a large majority of cases a window which lights a room is deemed necessary to the lighting of that room and is, on the whole, essential to the comfortable enjoyment of that room, but it does not follow that the right to access of light to that window is an easement of necessity. Where are you to draw the line? Supposing the blocking up of the window largely interferes with the comfort and enjoyment of the room, is the grantee of the adjacent land entitled to block it up, or does the exception stand? It seems to me that the line to be drawn is pointed out by Stirling L.J. in *Union Lighterage Co.* v. *London Graving Dock Co.* (1) His Lordship makes a distinction between an easement of necessity and an easement necessary to the reasonable enjoyment of property. After referring to the two rules laid down in *Wheeldon* v. *Burrows* (2) and the exceptions thereto he says: "The appellants did not dispute that there is no express reservation in the conveyance to the plaintiffs, but they contended that the easement claimed by the defendants is an 'easement of necessity' within the recognised exception to the second rule. Now, in the passages cited the expressions 'ways of necessity' and 'easements of necessity' are used in contrast with the other expressions, 'easements which are necessary to the reasonable enjoyment of the property granted,' and 'easements . . . . necessary to the reasonable enjoyment of the property conveyed,' and the word 'necessity' in the former expressions has plainly a narrower meaning than the word 'necessary' in the latter. In my opinion an easement of necessity, such as is referred to, means an easement without which the property retained cannot be used at all, and not one merely necessary to the reasonable enjoyment of that property." Then, after pointing out that the lights in *Wheeldon* v. *Burrows* (2) were reasonably necessary to the enjoyment of the workshop, he says: "So here it may be that the tie-rods which pass through the plaintiffs' property are reasonably necessary to the enjoyment of the defendants' dock in its

(1) [1902] 2 Ch. 557, 572. (2) 12 Ch. D. 31, 49.

present condition; but the dock is capable of use without them, and I think that there cannot be implied any reservation in respect of them." That seems to me to draw the distinction between what is absolutely necessary and what is reasonably required for the enjoyment of the land or building as it stands. In my judgment this is a window to which the access of light cannot be reserved by implication upon the ground that the light is necessary to the pantry. It cannot be that there is any necessity by reason of its being used as a pantry, since it can be used for other purposes. It cannot be said that a special use of light attaches to it as a pantry, and to say, as the defendant does, that access of light to that window is reserved to him by necessity is giving to the word "necessity" a meaning which it does not properly bear in this connection.

[His Lordship made a declaration that the plaintiff was entitled to build on her hereditaments in such a manner as to obstruct the lights of the two windows in question.]

Solicitors: *Robinson & Bradley, for Brown, Briggs & Symonds, Stockport; Rowcliffes, Rawle & Co., for Joseph Grundey, Stockport.*

H. B. H.

FARWELL J.

1904

Jan. 11, 12.

In re KECK'S SETTLEMENT.

Settled Land Act—Capital Moneys—Improvements—Scheme approved by Trustees—Order of Court for Payment of Moneys expended—Discretion of Court—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 26.

Where an application is made to the Court under s. 26, sub-s. 2 (iii.), of the Settled Land Act, 1882, for an order sanctioning the application of capital moneys in paying for work done under a scheme of improvements approved by the trustees, the duties of the Court are not merely ministerial; it has a discretion, and must be satisfied that the scheme is a proper one. It is not sufficient to shew that the trustees have approved the scheme and the work has been done in pursuance of it.

THIS was an application by the tenant for life in possession of real estate settled by the will of G. A. L. Keck, who died in 1860, that the trustees of the will might be ordered to pay to him 2300*l.* out of capital moneys in their hands forming part of the settled estates in repayment of moneys expended by him in carrying out improvements according to a scheme which had been approved by the trustees. The improvement consisted in making a road intended to develop the settled land as a building estate. The application was opposed by the respondent T. C. L. Powys Keck, who was under the will tenant in tail in remainder expectant on the applicant's life estate. He had afterwards disentailed and resettled the estate on himself for life with remainders over. His ground of opposition was that the scheme was improper, being a premature attempt to develop the estate in an extravagant way before it was ripe for building upon.

The other respondents were trustees for the purposes of the Settled Land Acts of the will and of the compound settlement created by the will and the resettlement.

The only question argued was whether, on an application under the Settled Land Act, 1882, s. 26, sub-s. 2 (iii.), for an order sanctioning the application of money in carrying out a

scheme already approved by the trustees, the Court will go into the question of the merits of the scheme. (1)

Upjohn, K.C., and *E. P. Hewitt*, for the applicant. The proposed expenditure is for improvements authorized by the Settled Land Act, 1882 (see ss. 21 (iii.) and 25 (xvii.), and the scheme has been approved by the trustees. The Court will not now discuss the merits of the scheme. There are only two points to be considered: (1.) Is the employment of the money in the manner proposed authorized? Secondly, is the tenant

(1) The provisions of the Settled Land Act, 1882, relied upon in the argument, were the following:—

Sect. 22: "(1.) Capital money arising under this Act shall, in order to its being invested or applied as aforesaid, be paid either to the trustees of the settlement or into court, at the option of the tenant for life, and shall be invested or applied by the trustees, or under the direction of the Court, as the case may be, accordingly.

"(2.) The investment or other application by the trustees shall be made according to the direction of the tenant for life. . . . ."

Sect. 26: "(1.) Where the tenant for life is desirous that capital money arising under this Act shall be applied in or towards payment for an improvement authorized by this Act, he may submit for approval to the trustees of the settlement, or to the Court, as the case may require, a scheme for the execution of the improvement, shewing the proposed expenditure thereon.

"(2.) Where the capital money to be expended is in the hands of trustees, then, after a scheme is approved by them, the trustees may apply that money in or towards payment for the whole or part of any work or operation comprised in the improvement, on

"(i.) A certificate of the Land Commissioners," (now replaced by the Board of Agriculture; Board of Agriculture Act, 1889 (52 & 53 Vict. c. 30)), "certifying that the work or operation, or some specified part thereof, has been properly executed, and what amount is properly payable by the trustees in respect thereof, which certificate shall be conclusive in favour of the trustees as an authority and discharge for any payment made by them in pursuance thereof; or on

"(ii.) A like certificate of a competent engineer or able practical surveyor nominated by the trustees and approved by the Commissioners, or by the Court, which certificate shall be conclusive as aforesaid; or on

"(iii.) An order of the Court directing or authorizing the trustees to so apply a specified portion of the capital money."

Sub-s. 3 provides for the making an order when the money is in court.

FARWELL J.
1904
KECK'S SETTLEMENT, *In re.*

for life acting bonâ fide?—*In re Lord Coleridge's Settlement* (1); *In re Hotham.* (2)

Jenkins, K.C., and *H. S. Preston*, for the trustees, stated that they still approved the scheme.

Danckwerts, K.C., and *George Henderson*, for T. C. Powys Keck. The Court must be satisfied that the proposed expenditure is proper. In all cases of application of capital money arising under the Settled Land Act, 1882, the Act contemplates two classes of dealings. The tenant for life has an option whether the money is to be paid to the trustees or into court. If the money is paid to the trustees, the tenant for life is entitled, within certain wide limits, to direct its application, so far as investment is concerned, and the trustees are bound to obey his directions. If the money is in court, the Court has to sanction the proposed investment. But if the money is to be applied in improvements, the sections relating thereto begin, at s. 25, with a separate heading as Part VII. of the Act, and must be read as a separate code governing the application of the money. Sect. 26 contemplates the application of money by the trustees under the direction of the tenant for life, or under the sanction of an order of the Court. The scheme for improvements may be approved either by the trustees or the Court. But when the trustees have approved the scheme they may, under s. 26, sub-s. 2, pay the money on a proper certificate that the work is done, or require the sanction of an order of the Court. If they do the latter, the Court must inquire into the merits of the scheme; for if the money is applied without the sanction of the Court, then the propriety of the scheme may be disputed subsequently; but if the order of the Court is obtained, no one can afterwards dispute the propriety of the scheme: *Clarke* v. *Thornton* (3); *In re Duke of Norfolk's Parliamentary Estates.* (4)

The sanction of the Court is not, therefore, a merely ministerial matter. The Court has a discretion, and must be satisfied as to the merits of the scheme in order to exercise its discretion.

Upjohn, K.C., in reply.

(1) [1895] 2 Ch. 704.
(2) [1902] 2 Ch. 575.
(3) (1887) 35 Ch. D. 307.
(4) [1900] 1 Ch. 461.

FARWELL J. This is an application by a tenant for life for an order of the Court directing or authorizing the trustees to apply the sum of 2300*l.* out of capital money in the hands of the trustees in repayment to the tenant for life of moneys which he has expended in making part of a road under a scheme which the trustees have approved.

No question is raised of ultra vires or mala fides. The question I have to determine arises on the construction of the Act, namely, whether before making an order under s. 26, sub-s. 3, the Court has merely to be satisfied of the two facts, that the scheme has been approved and the money spent, or whether the Court has a discretion to refuse to make the order unless it is further satisfied that it is fit and proper to do so. The tenant for life contends that the Court has no further function than to make an order on being satisfied that the scheme has been approved and the money spent. The person next entitled in remainder opposes, and desires to go into evidence to shew that the scheme is improvident, and that the general trend of the tenant for life's action in respect of the management of this estate has been a too speedy development, to the great detriment of the estate. That is the case he wishes to put forward; and, after a perusal of lengthy affidavits by surveyors on both sides, it seems to me that, in the conflict of testimony which they disclose, I can only arrive at a satisfactory determination of the facts by seeing the witnesses in the box.

The question, therefore, arises whether under the Act of Parliament I have to be satisfied as to these facts or not. There is no doubt that the Settled Land Act, 1882, has given tenants for life very large powers that they never had before. Under s. 3 they have a general power to sell the fee simple of the land of their own free will, without the consent of the trustees and without the order of any Court. That is qualified by s. 15, which negatives the power to sell the mansion-house without the consent of the trustees of the settlement, or an order of the Court. That has been repealed by the Act of 1890 and replaced by s. 10 of that Act. And by s. 37 of the Act—the heirloom section—there is a power to sell or purchase chattels if sanctioned by an order of the Court. The tenant

FARWELL J.
1904
KECK'S SETTLEMENT, *In re.*

for life, therefore, has in these two cases, where he wishes to deal with the settled land, to get an order of the Court. He has also, under s. 53, to have regard to the interests of all parties entitled under the settlement, and he is as regards the exercise of his powers in the position of a trustee. When the settled land has been sold, the next question which arises is, What is to be done with the purchase-money? And that is provided for by a series of sections beginning with s. 21. A number of investments are specified. [His Lordship enumerated briefly all the modes specified in s. 21 for the application of capital moneys arising under the Act, and continued:—]

All these matters are in the discretion of the tenant for life under s. 22, sub-s. 2, with the exception of a payment for any improvement authorized by the Act. The extent of the duties which the trustees have to perform in considering the investments proposed by the tenant for life has been recently dealt with by the Court in *In re Lord Coleridge's Settlement* (1) and in *In re Hotham* (2), before the Court of Appeal.

Then when you come to deal with the improvements, you find a fresh fasciculus of clauses put under Part VII. of the Act, beginning with s. 25. The improvements are described. They are very numerous, and I will not go through them; but new roads made for the development of land and building estates are amongst them. Then there comes s. 26. [His Lordship read s. 26, and continued:—]

It will be observed that the first two clauses of sub-s. 2 of s. 26 deal with matters of fact—that is to say, that the work has been properly executed, which is a matter best proved by some able practical surveyor or a man of experience of that nature, and that the amount is properly payable by the trustees in respect thereof. Those are matters of fact, and not matters of law. With respect to those two, the trustees get a discharge for any payment made by them on the certificate. But then there is the third alternative of an order of the Court. I cannot think that the intention was merely to substitute an order made on a formal application to the Court for the certificate of the able practical surveyor, and nothing more. I cannot

(1) [1895] 2 Ch. 704. (2) [1902] 2 Ch. 575.

resist the conviction that inasmuch as these improvements may be of a very expensive nature, and require a very considerable amount of discretion, it has been thought advisable to insert a provision by which, although the trustees may have approved the scheme, and although the tenant for life may direct the money to be so employed, it is possible to bring the matter before the Court for the exercise of its judicial discretion.

If the trustees had chosen to obtain the certificate of the able practical surveyor, or other person mentioned in sub-s. 2, the matter could only have been brought before the Court by the remaindermen themselves challenging the proceeding as something which ought not to have been done. But if, as the case now is, the tenant for life and the trustees, acting in concert, although not concurring in the application, seek to obtain an order of the Court to sanction the application of the money instead of themselves relying on any such certificate, then it appears to me that the Court has cast upon it a discretion which, I think, is exceedingly difficult to discharge, namely, a discretion to see whether the remainderman is in fact well founded in saying that the improvements are, although honest, so utterly wrong-headed that they ought not to be sanctioned. I think the observations of Byrne J. in the case of *In re Duke of Norfolk's Parliamentary Estates* (1) throw some light upon this. His Lordship says: "The scheme of the Act is to give wide powers to the tenant for life, and to give power of consent to trustees, upon the footing that they will act fairly in the exercise of their respective powers, and that neither trustees nor the Court will sanction schemes which are improvident, or which will unduly fetter any discretion which ought to be exercised at a later date, and there is always this safeguard, that tenants for life and trustees joining in improvident schemes, or not acting with a due regard to the interest of the remaindermen, are running the risk of the possible establishment of a personal liability against themselves." But the Court cannot make an order under this clause (iii.) without excluding any such personal liability, because, if the payment is made under the order of the Court, it is impossible, while

(1) [1900] 1 Ch. 461, 467.

FARWELL J.
1904
KECK'S SETTLEMENT, *In re.*

that order stands, for any remainderman to challenge such payment. Neither the trustees nor the tenant for life nor anybody else is liable for acting on an order of the Court. There is some slip in the report of what Chitty J. said in *Clarke* v. *Thornton* (1), but I think he was referring to this particular section, and intending to indicate his view as to its meaning; he says: "If the money had been in the hands of trustees it appears to me the tenant for life might have said it is my option that these capital moneys shall be applied in improvements under the Act. If he had done that it would have been his duty to submit under the 26th section a scheme to the trustees." Then his Lordship reads from s. 26 and s. 22, sub-s. 2, and says: "If the tenant for life was desirous of exercising his option in the manner I have mentioned he would have had to submit a scheme to the trustees, and the trustees, in my opinion, notwithstanding this discretionary trust, might without breach of duty have acceded to his application and approved of his scheme." Then his Lordship goes on to use some words which look as if he was referring to the later sections, and not to this one; but, inasmuch as at the end of the sentence he says, "they might have declined to approve of the scheme, unless there was an order of the Court directing or authorizing them under the 3rd sub-section of the 2nd sub-section of s. 26 to apply the capital money in that manner," and as that section only applies after the scheme has been approved, I think it is only fair to assume that there must be some slip in this report. What the learned judge obviously meant was, not only might the trustees have objected to approve the scheme, but they might have declined to act on any certificate under clauses (i.) or (ii.) of sub-s. 2, and have required an order of the Court. They might have thought for some reason or other that it was safer for them to have the sanction of the Court. They might have said, "So far as we are concerned we are satisfied and approve the scheme, but we know the remainderman in this case is objecting, and therefore we do not choose to act on the certificate, and we must require you to apply to the Court for an order."

(1) 35 Ch. D. 307, 313.

That being so, it seems to me the Court is driven to exercise the discretion which the Legislature has conferred upon it, and do the best it can to see whether this proposed mode of managing the estate is or is not compatible with due regard to the interest of all parties. There is a difficulty, no doubt, in this view, created by the language of s. 31 authorizing the tenant for life to enter into a contract relating to the execution of any improvement authorized by the Act, but I think that may very well be got over by saying that it applies to the great majority of cases where the tenant for life does contract, and where no question arises and an order of the Court is not sought for. When an order of the Court has to be obtained, it appears to me that any such contract as that must be at the risk of the tenant for life.

The result is that I have to be satisfied by evidence that the scheme is one which I ought to sanction.

[Evidence was then given, and his Lordship finally sanctioned the scheme.]

Solicitors: *Stow, Preston & Co., for R. B. Berridge & Sons, Leicester; R. S. Taylor, Son & Humbert.*

J. R. B.

FARWELL J.

1904

April 19.

STEVENS *v.* KING.

[1872 S. 318.]

Will — Lapse — Gift with Intention of discharging Obligation — Death of Legatee.

Where on the true construction of a will the Court finds that the testator's intention in giving a legacy was not merely bounty to the legatee, but to discharge a moral obligation recognised by the testator, whether legally enforceable or not, the legacy will not lapse by the legatee's death in the testator's lifetime.

UNDER the will of Thomas John King, who died in 1859, his daughter Charlotte Wilson, widow, his son William King, and another daughter were entitled to his residuary estate in equal shares. By a deed of family arrangement dated April 23, 1860, to which all three children of the testator were parties, certain real property, part of the testator's residuary estate, was conveyed to William King upon trust for management and sale, and as to one-third part of the proceeds of sale, and of the rents and profits until sale, upon trust for Charlotte Wilson. By a settlement dated April 26, 1860, made on the marriage then intended and shortly afterwards solemnized between Charlotte Wilson and Charles Stuart, the one-third share to which Charlotte Wilson was entitled under the testator's will and deed of arrangement was assigned to trustees upon trust for the separate use of the said Charlotte Wilson for her life, and after her death for such persons as she should by will appoint, and in default of appointment, subject to a payment of 2000*l.* to the child of Charlotte Wilson by her former marriage, upon trust for the children of the then intended marriage.

Charles Stuart died in 1861, and in 1874 his widow was married to John Blinks.

This action was commenced in 1872 for the execution of the trusts of the deed of arrangement of April 23, 1860. By the decree dated March 8, 1875, a sale of the property was ordered, and certain accounts and inquiries directed.

By the order made on further consideration of the action dated August 6, 1877, it was ordered that the said Charlotte Blinks, by her counsel admitting that certain moneys appearing by the chief clerk's certificate to have been paid to her by W. King in excess of her share of the income of the trust estate and other moneys therein mentioned constituted an aggregate debt of 284*l.* 8*s.* 1*d.* then due and owing from her to the defendant W. King, for the payment whereof her separate estate was liable, and by her counsel undertaking to execute in favour of the said defendant a valid appointment by will of the said sum of 284*l.* 8*s.* 1*d.* out of the property subject to the power of appointment given to her under the said indenture of April 26, 1860, and not thereafter to exercise her said power of appointment so as in any way to prejudice or affect such appointment in the defendant's favour as aforesaid, the defendant should be at liberty, on and after the death of the said Charlotte Blinks, to apply with reference to the enforcement of such undertaking as he might be advised.

By her will dated September 14, 1877, Charlotte Blinks made the following appointment: "I, Charlotte Blinks, do hereby, in exercise of the power given to me by the settlement executed by me on my marriage with the late Charles Stuart bearing date April 26, 1860, and in compliance with the order on further consideration of the High Court of Justice, Chancery Division, in the suit of *Stevens* v. *King*, bearing date August 6, 1877, appoint and bequeath to my brother William King the several sums of 168*l.* 18*s.* 7*d.* and 115*l.* 9*s.* 6*d.*, making together the sum of 284*l.* 8*s.* 1*d.*" The testatrix made another appointment of 500*l.* and interest in discharge of a mortgage security created by herself, and appointed an executrix, but she did not dispose of any property of her own.

Charlotte Blinks died on December 4, 1903. William King had died in her lifetime.

This was a petition presented in the action by the legal personal representative of Charlotte Blinks and the persons entitled under the settlement in default of appointment, asking that the fund might be distributed on the assumption that the appointment to William King had lapsed.

FARWELL J. 1904 STEVENS v. KING.

Vaughan Hawkins, for the petition. The question is whether the testatrix has shewn a clear intention to take the whole of this fund out of the settlement and make it part of her own estate. If she has not done so, the fund must go to the persons entitled in default of appointment, for the appointment has clearly failed.

The mere appointment of an executor is not enough: *In re Boyd.* (1)

There must be words dealing with the appointed fund and her own property as a mixed fund such as were found in *In re Marten* (2), or something else to shew a clear intention to make the fund her own for all purposes.

Hart, for the legal personal representative of W. King. My first point is that there is no lapse. If that is decided in my favour, there is no need to consider whether the fund has been made assets of the testatrix.

The question whether lapse follows on a legatee's predeceasing the testator is one of intention. Lapse may be avoided by apt words, and it will be avoided if there are clear words shewing that the testator's intention was, not to give a bounty, but to discharge an obligation which he considered ought to be discharged, though it might not be legally enforceable: *Williamson* v. *Naylor* (3); *Philips* v. *Philips* (4); *In re Sowerby's Trust* (5); *Turner* v. *Martin.* (6)

In this will the statement that it is made in compliance with the order shews that the testatrix's intention was to discharge this debt, not to give a bounty. The order would not be complied with if the appointment were only made to W. King "if he shall survive me."

Vaughan Hawkins, in reply. The intention of the will is merely to carry out the bargain made by the order, which is to appoint to W. King personally. In *Williamson* v. *Naylor* (3) and the other cases cited the direction was to pay a whole class of creditors what should be due to them. Here there is

(1) [1897] 2 Ch. 232.
(2) [1902] 1 Ch. 314.
(3) (1838) 3 Y. & C. Ex. 208.
(4) (1844) 3 Hare, 281; 64 R. R. 296.
(5) (1856) 2 K. & J. 630.
(6) (1857) 7 D. M. & G. 429.

no reference to the debt; the appointment is of a sum of money, and W. King, if he had survived, would have taken even if his debt had been discharged.

To prevent a lapse there must be the clearest expression of intention: *Corbyn* v. *French*. (1)

FARWELL J. (after stating the circumstances of the case and reading the order on further consideration). The order shews that Charlotte Blinks admitted a liability affecting her separate estate to pay this money to King, and she undertook to make an appointment in discharge of her liability. Then she made her will expressly in compliance with the order. [His Lordship read the appointment in favour of W. King.] She made another appointment of 500*l*., which was also in discharge of a debt, and appointed an executrix, but her will did not deal with any other property.

I am only concerned with the appointment to W. King. He died in the testatrix's lifetime. The petitioners contend that the appointment lapsed by his death. The doctrine that a legacy lapses by the death of the legatee in the testator's lifetime means, I take it, that the whole object of the testator in giving the legacy has failed by reason of the legatee's death. But that must depend on the question what the testator's object was. I think that the cases of *Williamson* v. *Naylor* (2), *Philips* v. *Philips* (3), and *In re Sowerby's Trust* (4) have established the rule that, if the Court finds, upon the construction of the will, that the testator clearly intended not to giv a mere bounty to the legatee, but to discharge what he regarded as a moral obligation, whether it were legally binding or not, and if that obligation still exists at the testator's death, there is no necessary failure of the testator's object merely because the legatee dies in his lifetime; and therefore death in such a case does not cause a lapse. On the construction of this will I think it is perfectly clear that the testatrix intended to discharge an obligation. And, in spite of the arguments of the petitioners' counsel, I am satisfied that, if the liability had

(1) (1799) 4 Ves. 418, 435.
(2) 3 Y. & C. Ex. 208.
(3) 3 Hare, 281; 64 R. R. 296.
(4) 2 K. & J. 630.

FARWELL J. 1904 STEVENS v. KING.

been discharged from another source, W. King could not have claimed the legacy though he had survived. I think also the fact that the testatrix, being a married woman and not dealing by her will with any property of her own, appointed an executrix affords an additional argument that the executrix was to discharge these obligations to the persons entitled thereto; otherwise there is no reason for her appointment. The result is that there is no lapse, and the appointed funds must be paid to the legal personal representative of W. King.

Solicitors: *W. J. Fraser & Son; W. W. Box.*

J. R. B.

FARWELL J. 1904 *May* 5.

ATTORNEY-GENERAL *v.* WIMBLEDON HOUSE ESTATE COMPANY, LIMITED.

[1904 A. 133.]

Local Government—Urban Authority—Street—Infringement of Building Line — Statutory Remedy — Penalty — Conviction — Subsequent Action by Attorney-General for Injunction—Laches—Mandatory Order to pull down —Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 157, 158, 251—*Public Health* (*Buildings in Streets*) *Act*, 1888 (51 & 52 *Vict. c.* 52), *s.* 3.

The penalty prescribed by s. 3 of the Public Health (Buildings in Streets) Act, 1888, for a breach of the prohibition in the first part of the section against infringing the building line is not the only remedy for the offence. It is a public general Act, and an injunction will lie at the suit of the Attorney-General on behalf of the public to restrain the infringement of the building line, and in a proper case a mandatory order to pull down will be made, even although the offender has been previously convicted and fined under the section for the offence by a Court of summary jurisdiction.

Attorney-General v. *Ashbourne Recreation Ground Co.*, [1903] 1 Ch. 101, followed.

Observations on imputing laches to the Attorney-General and the relators in an action for injunction where the latter are a local authority.

THIS was an action by the Attorney-General at the relation of the urban district council of Wimbledon, and by the said district council, for a mandatory injunction to compel the defendants to pull down part of a building under these circumstances.

The plaintiffs, the urban district council of Wimbledon (hereafter called "the council"), are the urban authority for the urban district of Wimbledon in Surrey. In June, 1900, Mr. Cooper, the surveyor of the council, issued or published to architects and builders the following notice :—

"*Re* Plans of New Buildings or of Alterations or Additions.

"All building plans and building notices must be deposited not later than noon on the second Thursday and last Thursday in each month.

"The surveyor will, before submitting them to the buildings committee, proceed to examine them and give notice to the person depositing them of any matter in respect of which they may appear to him to contravene the Public Health Acts or the by-laws of the council. The plans will not be returned, but may be corrected or altered at the surveyor's office any morning between 9 A.M. and 11 A.M. before the meeting of the committee.

"(Signed) C. H. Cooper."

A copy of this notice was sent to the architects of the defendants, who are an estate company and were proposing to erect houses in Parkside Gardens in the urban district of Wimbledon. Parkside Gardens is a street within the meaning of the said Acts.

On August 28, 1903, the defendants deposited with the council the plans and sections of a private residence with a billiard-room and usual offices, which they proposed to erect on the east side of Parkside Gardens, and gave notice that they would commence building on August 31. The deposited plans shewed that the front main wall of the billiard-room, not exceeding twelve feet in height to the eaves, being an adjunct to the house, would project six feet three inches beyond the line of the main wall of the adjoining house. The plans were made in ignorance that the wall of the billiard-room would infringe the building line, and without any intention of committing a breach of the provisions of s. 3 of the Public Health (Buildings in Streets) Act, 1888. On August 31 the defendants commenced to build. On September 8 Mr. Cooper required

FARWELL J.
1904
ATTORNEY-GENERAL v. WIMBLEDON HOUSE ESTATE COMPANY, LIMITED.

certain amendments to be made in the plans in order that they might comply with the by-laws of the council, and on September 14 the required amendments were made.

On September 15 the building committee of the council disapproved of the plans on the ground that they infringed the building line, and on September 23 the council passed a resolution confirming the decision of the building committee. On September 24 the council gave the defendants notice that their plans were disapproved, but by some blunder the cause of disapproval was stated to be non-compliance with the council's by-laws, when it should have been non-compliance with s. 3 of the Act of 1888. On September 28 the assistant surveyor of the council saw the assistant architect of the defendants, and informed him that the real ground of disapproval was the infringement of the building line. By this date the walls of the billiard-room were up some five feet above ground, and the defendants continued to build. On November 18 the council served on the defendants formal notice of objection under s. 3 of the Act of 1888. At this date the walls of the billiard-room were up to their full height, and the rafters for the roof were in place. A summons was then issued by the council against the defendants, and at the hearing of the matter on December 9 by the magistrates in petty sessions at Wimbledon the defendants were convicted and fined 20*l.* and costs, which were paid. The present action was commenced on January 28, 1904, and the plaintiffs claimed a mandatory injunction to pull down so much of the building as infringed the building line as above stated. The defendants by their defence alleged that the projection of the wall of the billiard-room beyond the building line was of a most trivial character; and that, as the council had pursued their remedy under the Act, the Court had no jurisdiction in the matter; but if there was jurisdiction, then that the plaintiffs were not entitled to a mandatory order by reason of their laches and conduct.

Danckwerts, K.C., and *R. J. Parker*, for the plaintiffs. The question is, What are the rights of the Attorney-General? Under the by-laws of the council plans have to be deposited at

their office, and then under ss. 157 and 158 of the Public Health Act, 1875, they have a month within which to approve or disapprove the plans. The notice sent by the surveyor was an act of supererogation on his part and could not bind the council. The defendants had no right to commence building before their plans were approved. They did not wait the month, but chose to run the risk and began to build at once, and continued to build after notice of disapproval. The Act is a public statute passed for the benefit of the public purely for sanitary reasons and with the object of securing, not merely uniformity of building line, but the uninterrupted access of light and air to the houses on either side. The conviction and fine by the magistrates do not affect the right of the Attorney-General to maintain an action for an injunction to restrain the breach of a public right: *Attorney-General* v. *Johnson* (1); *Attorney-General* v. *Ashbourne Recreation Ground Co.* (2); *Devonport Corporation* v. *Tozer* (3); and this Court cannot question his discretion in deciding to initiate this litigation: *London County Council* v. *Attorney-General.* (4) It may be said that s. 3 of the Act requires buildings to be on either side, but in *Leyton Local Board* v. *Causton* (5) it was held that it was sufficient if there was a building on one side only.

[*Upjohn, K.C.* I do not dispute that decision.]

Then the plaintiffs have only to shew that the statute has in fact been infringed. It is not disputed that the building line is infringed. It is a continuing offence. The defendants have not been misled by the council in any way, and laches cannot be imputed to the Attorney-General: *Attorney-General* v. *Bradford Canal Proprietors.* (6) The plaintiffs, therefore, are entitled to an order to pull down the billiard-room so far as it infringes the building line.

Upjohn, K.C., and *H. W. Horne*, for the defendants. There are several objections. First, s. 3 of the Act of 1888 creates a new offence and imposes a penalty, and that is the only

(1) (1819) 2 Wils. Ch. 87; 18 R. R. 156.
(2) [1903] 1 Ch. 101.
(3) [1903] 1 Ch. 759.
(4) [1902] A. C. 165.
(5) (1893) 57 J. P. 135.
(6) (1866) 15 L. T. 9.

FARWELL J.
1904
ATTORNEY-GENERAL v. WIMBLEDON HOUSE ESTATE COMPANY, LIMITED.

remedy: *Reg.* v. *Hall.* (1) But if there is also a remedy by injunction, this Court will be slow to grant an injunction where a statutory remedy exists: *Grand Junction Waterworks Co.* v. *Hampton Urban Council.* (2) Secondly, the plaintiffs cannot pursue both remedies at the same time, and having pursued the statutory remedy they cannot now pursue the other. By s. 251 of the Act of 1875 the penalty can be enforced and recovered in a Court of summary jurisdiction. That throws us on the Summary Jurisdiction Act, 1879. Under that Act the magistrates could have ordered the billiard-room to be pulled down, but they inflicted instead a fine of 20*l.* by way of damages. That was an adjudication between the parties, and the plaintiffs cannot now sue for an injunction: *Kinnis* v. *Graves.* (3) But even if the plaintiffs have a remedy by injunction, this case is distinguishable from *Attorney-General* v. *Ashbourne Recreation Ground Co.* (4) In that case Buckley J. points out that there no penalty was imposed by the statute.

[FARWELL J. I do not think that Buckley J. intended to draw any such distinction if his judgment is read as a whole.]

In *Devonport Corporation* v. *Tozer* (5) Collins M.R. points out that *Attorney-General* v. *Ashbourne Recreation Ground Co.* (4) was a case where the local authority had not pursued their statutory remedy. Thirdly, delay and conduct on the part of relators can be imputed to the Attorney-General when suing on behalf of the public: *Attorney-General* v. *Johnson* (6); *Attorney-General* v. *Cleaver* (7); *Attorney-General* v. *Sheffield Gas Consumers' Co.* (8) Here the defendants were misled by the delay and conduct of the council and their officials. We deposited our plans in accordance with the surveyor's notice, and altered them to comply with the council's by-laws. The council knew we commenced to build on August 31, and from that date their inspector and other officials were constantly on our works and saw what was going on, and no objection as to the building line

(1) [1891] 1 Q. B. 747, 753.
(2) [1898] 2 Ch. 331, 345.
(3) (1898) 67 L. J. (Q.B.) 583.
(4) [1903] 1 Ch. 101.
(5) [1903] 1 Ch. 759.
(6) 2 Wils. Ch. 87; 18 R. R. 156.
(7) (1811) 18 Ves. 211.
(8) (1853) 3 D. M. & G. 304, 320.

was taken until September 28. They ought to have taken proceedings within a week of that date, but they did nothing until November 18, when the wall of the billiard-room was completed; and the writ in this action was not issued until January 28. Under the circumstances the laches of the plaintiffs disentitles them to an injunction. Lastly, the breach of the building line is so trivial an injury to the public, that at any rate it is not a case for a mandatory order.

R. J. Parker, in reply, on the question of laches, referred to *Attorney-General* v. *Johnson* (1), and *Attorney-General* v. *Bradford Canal Proprietors*. (2)

FARWELL J. This is an action by the Attorney-General and also by the urban district council of Wimbledon, and it is not the less the Attorney-General's action because it is on the relation of the urban district council, who are joined as relators merely in order to hold them liable for costs. The object of the action is to obtain a mandatory injunction to pull down part of a house which has been erected in contravention of s. 3 of the Public Health (Buildings in Streets) Act, 1888, which enacts that "It shall not be lawful in any urban district, without the written consent of the urban authority, to erect or bring forward any house or building in any street, or any part of such house or building, beyond the front main wall of the house or building on either side thereof in the same street, nor to build any addition to any house or building beyond the front main wall of the house or building on either side of the same." It is admitted that the billiard-room in question has been erected and brought forward and does project beyond the front main wall of the house on the side of it, and that it is situate in "a street" within the meaning of the Act, and that no written consent of the council has ever been obtained. The objections taken are several, and the material facts are these. On August 28, 1903, the council received plans of the new house which the defendants proposed to build. In accordance with the ordinary practice the council, if not under their by-laws, at any rate by analogy to the provisions of ss. 157 and

(1) 2 Wils. Ch. 87; 18 R. R. 156. (2) 15 L. T. 9.

FARWELL J.
1904
ATTORNEY-GENERAL v. WIMBLEDON HOUSE ESTATE COMPANY, LIMITED.

158 of the Public Health Act, 1875, took a month to consider the plans, and within that time to signify in writing their approval or disapproval. On August 31, that is three days after their notice, the defendants began to build. They are a land company with eminent architects advising them, and knew or were bound to know the provisions of this 3rd section. They must have known, therefore, that they began to build at their own risk. On September 18 the plans which they had deposited were amended in accordance with certain suggestions made by the surveyor of the council. With regard to that I ought to mention that in this particular district the surveyor officiously, in its inoffensive sense as opposed to officially, issued a notice that the plans would be inspected by him, and that he would consider them and notify deviations from the by-laws before they came on for consideration by the council. That is one of the points put forward as the ground on which the defendants say they were misled. The surveyor does this mero motu, out of goodwill and in order to save time, and I cannot believe that that is not perfectly well understood; but I would suggest that some statement to that effect should in future be added to the surveyor's notice, so that it may be known that these suggestions are gratuitous on the part of the surveyor and are not the suggestions of the council so as to bind them in any way. In this case I do not think the notice binds them in the least. There is no provision in the Act of 1875 or in the by-laws for any such suggestion by the surveyor, and I think he did it, as I said, out of mere grace. Then on September 15 the committee before whom the plans came disapproved them, and on September 23, 1903, the council, on the recommendation of the committee, also disapproved the plans. Notice of disapproval was sent on the 24th, coupled with a letter stating that the council disapproved of the deposited plans because they were not in conformity with the council's by-laws. That was a mistake. They were in accordance with the council's by-laws, but they were not in accordance with the Act of Parliament; and on September 28 the assistant surveyor of the council saw the defendants' assistant architect, and told him that the reason why the plans

were disapproved was because the billiard-room was in front of the main wall of the adjoining building. Down to this point, therefore, so far from there being any written consent of the council, or any ground on which any reasonable being could suppose that such a written consent would ultimately be given, there is not the smallest suggestion of it. Then on November 18 the council served on the defendants a formal notice pursuant to the provisions of the 3rd section for the purpose of founding proceedings, and in December the defendants were prosecuted before the magistrates and were convicted and fined 20*l*. Now the first point taken by the defendants is that there is one remedy only, namely, the remedy given by the statute, which in the latter part of the section provides: "Any person offending against this enactment shall be liable to a penalty not exceeding 40*s*. for every day during which the offence is continued after written notice in this behalf from the urban authority." In my opinion that point is concluded by the decision of Buckley J. in *Attorney-General* v. *Ashbourne Recreation Ground Co.* (1), approved by the Court of Appeal in *Devonport Corporation* v. *Tozer*. (2) I am clear that there is not one remedy only, namely, the statutory remedy. There is, first of all, the statutory obligation not to build without the written consent, and if that is disobeyed—apart from any question of penalty—there is a remedy by injunction, because it is a public general Act prohibiting certain matters in the interests of public health and in order to preserve uniformity in the width of the public streets, and that is a matter for which the Attorney-General can sue. Then the next point taken is that, inasmuch as the defendants have already been fined by the magistrates, they cannot now be attacked by the Attorney-General. In my opinion that is a misapprehension. The penalty imposed is a penalty which can be, and has been according to one of the reported cases (3), imposed time after time if the offence is continued. Although the section is curiously worded, making the actual erection of the building the only offence, the penalty is measured by

(1) [1903] 1 Ch. 101.
(2) [1903] 1 Ch. 759.
(3) See *Rumball* v. *Schmidt*, (1882) 8 Q. B. D. 603.

FARWELL J.
1904
ATTORNEY-GENERAL v. WIMBLEDON HOUSE ESTATE COMPANY, LIMITED.

the continuance of the offence, and if the offence is committed I see no reason why the Attorney-General should not be heard to say in this Court, "The defendants have done that which the Act of Parliament has forbidden them to do, and I appeal to the Court to make them take it down again." I think there is nothing in the point that, inasmuch as the defendants have been fined once, they cannot now be ordered to take down the building so as to avoid the necessity of multiplicity of indictments or prosecutions that would otherwise follow. Then the third point taken is laches. I do not think it is necessary for me to express any opinion on the conflicting authorities which have been referred to—the dictum of Lord Eldon in *Attorney-General* v. *Johnson* (1), the statement by Turner L.J. in *Attorney-General* v. *Sheffield Gas Consumers' Co.* (2), the conflicting statement of Wood V.-C. in *Attorney-General* v. *Bradford Canal Proprietors* (3)—as to whether the Attorney-General can have laches attributed to him. The Court no doubt has a discretion in the case of Attorney-General actions as well as other actions. It is not sufficient for the Attorney-General simply to come to the Court and say, "I call attention to the fact that there has been a breach of this statute, and it follows as a matter of course that the mandatory injunction which I ask for must be granted." But whatever may be the doctrine of laches—if it can properly be called laches—attributable to the Attorney-General, in my opinion there is no case for it here. In the first place, there is nothing that can be charged either against the council or the Attorney-General which shews any default on their part, or that can have led the defendants to go on building as they have done. They chose to begin to build within three days after they deposited their plans, and they had the walls of the billiard-room up five feet high on September 28, and on November 18 the walls were up eleven feet and the roof rafters were put upon them. During all this time they had no ground for supposing that the council were going to give their consent. The defendants must have known that they were building at their own risk. I pass over the

(1) 2 Wils. Ch. 87; 18 R. R. 156. (2) 3 D. M. & G. 304.
(3) 15 L. T. 9.

suggestions made in cross-examination that the officials of the council had in some way led the defendants to believe that the council would consent. I wish to say, in the first place, I find no evidence whatever that they did so; and, in the second place, I think it would be most dangerous—even although the architect and assistant architect and the builder and inspector all came and said, "We have no doubt the local authority will give their consent because we shall advise them to do so"—to hold that a local authority would be bound in any way so that, if in the exercise of their discretion in that behalf they afterwards refuse to approve of plans, they are nevertheless to be controlled by the unauthorized and wholly officious statements of their own officials, and are to be prevented from putting the Attorney-General in motion to exercise his rights for the protection of the public which the Act of Parliament has given him. Therefore, there is nothing in the point of laches. The parties were at arm's length, they knew that the consent had been actually refused, and they knew the reason why it had been refused, and they continued to build at their own risk. In my opinion there is no ground for imputing laches to any one on the part of the plaintiffs. I can only see a bold determination on the part of the defendants to insist upon going on their own way in spite of everything, hoping for the best, and trusting that nobody would compel them to pull down what they had put up. I feel some regret at having to order a building to be taken down, but it is an injury to the public, and there is no one to whom compensation can be made. It is said that it is a small matter; but I think that the passage in Lord Halsbury's judgment in *London County Council* v. *Attorney-General* (1) is germane on this point. His Lordship says (2): "It may well be that it is true that the Attorney-General ought not to put into operation the whole machinery of the first law officer of the Crown in order to bring into Court some trifling matter. But if he did, it would not go to his jurisdiction; it would go, I think, to the conduct of his office, and it might be made, perhaps in Parliament, the subject of adverse comment; but what right

(1) [1902] A. C. 165. (2) [1902] A. C. 168.

FARWELL J. 1904 ATTORNEY-GENERAL v. WIMBLEDON HOUSE ESTATE COMPANY, LIMITED.

has a Court of law to intervene? If there is excess of power claimed by a particular public body, and it is a matter that concerns the public, it seems to me that it is for the Attorney-General and not for the Courts to determine whether he ought to initiate litigation in that respect or not." I cannot say that the Attorney-General ought not to have initiated this litigation; and, having initiated it, I cannot say he is not justified in pressing the Court to grant a mandatory injunction, because there is no other remedy open. I see no other way of protecting the public in giving them the benefit of this section except by granting a mandatory injunction. There is no one to whom I can give damages, and there is no other means I can see of giving effect to the Act of Parliament. Then it was said that the magistrates fined the defendants 20*l.* by way of compensation. I have admitted the shorthand notes of the proceedings before the magistrates de bene esse, although in my opinion they are not admissible and I do not think I ought to pay any regard to them. I can only say that the only jurisdiction the magistrates had was to impose a penalty, and that the penalty is measured by the length of time of the continuance of the offence, and that they can go on imposing those penalties afterwards if they think fit; and they have the right under the Summary Jurisdiction Act, if they think it a trifling matter, of refusing to impose any penalty at all. How that affects the Attorney-General I fail to see. The general prohibition comes in the earlier part of the section. The Attorney-General has brought to the attention of the Court the fact that there has been a clear and deliberate breach of the duty imposed by a public statute, and in my opinion the mandatory injunction follows as a matter of course; but it will be confined to the billiard-room, as that is all that has been argued before me; and the defendants must pay the costs of the action.

Solicitors for plaintiffs: *Sharpe, Parker & Co., for R. H. Smethurst-Butterworth, Wimbledon.*

Solicitors for defendants: *Horne & Birkett.*

H. L. F.

In re LEEDS AND HANLEY THEATRES OF VARIETIES, LIMITED.

BUCKLEY J.

1904

April 21, 22.

[No. 00245 of 1899.]

Company—Winding-up—Two Insolvent Companies—Cross-claims—Adjustment—Claim on Debentures—Damages for Misfeasance—Dividend.

The F. Company and the T. Company were both in liquidation; the F. Company were creditors of the T. Company for 5100*l.* on debentures of the T. Company, and were also debtors to the T. Company for 4323*l.*, the balance of a sum of 12,000*l.* ordered to be paid to the T. Company for misfeasance. There being no mutual credit, and consequently no set-off of these two debts, the question now raised was how the claim by the F. Company for 5100*l.* against the T. Company was to be adjusted:—

Held, that in distributing the assets of the T. Company the liquidator must treat the balance of the debt due from the F. Company as paid, and must divide the resulting total assets of the T. Company rateably among all the creditors of the T. Company, including the F. Company, the dividend due to the F. Company being pro tanto retained in respect of the debt due from them, which must thus be satisfied before any dividend on the 5100*l.* could be received by the F. Company.

THIS was a summons by the liquidator of the Consolidated Exploration and Finance Company, Limited (hereinafter referred to as the Finance Company), taken out in the winding-up of the Leeds and Hanley Theatres of Varieties, Limited (hereinafter referred to as the Theatres Company), for the direction of the Court as to the proper method of distributing the assets of the Theatres Company under the following circumstances.

The Finance Company went into voluntary liquidation in September, 1898.

In November, 1899, an order was made for the compulsory winding-up of the Theatres Company. The Finance Company was the original promoter of the Theatres Company, and at the date of the compulsory order was a creditor of the Theatres Company for a considerable sum under a debenture which had been issued by that company, and for which a proof was subsequently allowed for 5100*l.* 11*s.* 2*d.*

BUCKLEY J.
1904
LEEDS AND HANLEY THEATRES OF VARIETIES, LIMITED, *In re.*

After the compulsory order had been made against the Theatres Company, the official receiver and liquidator of that company instituted proceedings against the Finance Company under s. 10 of the Companies Act, 1890, with the result that the Court of Appeal, by an order of July 11, 1902, ordered the Finance Company to pay to the Theatres Company a sum of 12,000*l.* damages for misfeasance. At this time all the creditors of the Finance Company, other than the Theatres Company, had been satisfied, and there was standing to the credit of the Finance Company at the Board of Trade a sum of 7677*l.*

By an order of August 26, 1902, made in the winding-up of the Finance Company, the liquidator of that company was directed to pay to the official receiver and liquidator of the Theatres Company the full sum then standing to his credit at the Board of Trade, the official receiver and liquidator undertaking to set aside out of this money 1000*l.* to provide for any claim for the costs of the winding-up of the Finance Company, but this order was to be without prejudice to any rights the Finance Company might have to prove in the liquidation of the Theatres Company. In pursuance of this order the official receiver and liquidator of the Theatres Company received the sum of 7677*l.* in part payment of the 12,000*l.* damages directed to be paid by the order of the Court of Appeal.

By an order of April 8, 1903, made in the winding-up of the Theatres Company, the liquidator of the Finance Company was declared entitled to prove against the Theatres Company for the sum of 5100*l.* 11*s.* 2*d.* in respect of the money secured by the said debenture, and for interest thereon and costs.

Other actions were subsequently brought against the Finance Company by other persons for misfeasance, with the result that the Finance Company became liable to pay further sums to the various plaintiffs amounting altogether to 5490*l.*

The official receiver and liquidator of the Theatres Company had distributed portions of the 7677*l.* among the creditors of the Theatres Company, other than the Finance Company, by way of dividend, by which means some 16*s.* 8*d.* in the

pound had been paid to these creditors on their debts, and the liquidator now had in his hands a sum of about 3000*l.*

By his summons the applicant asked for (1.) a declaration that the respondent was not entitled to retain or make any set-off against the dividend due to the applicant in respect of his claim as liquidator of the Finance Company under the said debenture issued by the Theatres Company; (2.) an order directing the respondent to pay to the applicant the whole of the said dividend; (3.) an order directing the respondent to repay to the applicant the sum which the amount received by the respondent under the order of the Court of Appeal of July 11, 1902, exceeds the dividend payable in respect of the said sum of 12,000*l.* pro ratâ with all the other creditors of the Finance Company, or in the alternative to repay the sum received by the respondent in excess of the amount owing by the Finance Company on the balance of account between that company and the Theatres Company.

Buckmaster, K.C., and *Martelli*, for the summons. The position here is that the Theatres Company owes the Finance Company 5100*l.* on the debentures, and according to the ordinary rule cannot be entitled to receive anything out of the assets of the Finance Company until it has made good its debts to it; it also seems clear from *Ex parte Pelly* (1) that there is no right to set off the debt against the liability for misfeasance. All the reported cases are cases of liability for calls, which it is clear must be paid up in full as a contribution to the assets before a debt can be recovered from the company. The cases most like the present are *Ex parte Pelly* (1) and *Flitcroft's Case* (2); but in both those cases the debtor to the company was an individual; in the present case the Court is dealing with two insolvent companies, and must do justice to the shareholders of the company who has been guilty of the misfeasance equally with the shareholders of the company who is a creditor in respect of that misfeasance. The rule as to making good the debt before being entitled to receive, applies equally to both companies. If any difficulty

(1) (1882) 21 Ch. D. 492. (2) (1882) 21 Ch. D. 519.

BUCKLEY J.

1904

LEEDS AND HANLEY THEATRES OF VARIETIES, LIMITED, *In re.*

is caused by the fact that this application is entitled only in the winding-up of the Theatres Company, we should ask for leave to amend.

[BUCKLEY J. intimated that as both liquidations were before him the summons might be treated as issued in both.]

The Theatres Company has already received 7677*l.*; the difference between the 12,000*l.* owing by the Finance Company and the 5100*l.* owing to the Finance Company is 6900*l.*; therefore the Theatres Company ought to repay 777*l.*, the difference between 7677*l.* and 6900*l.* The fairest way of adjusting these claims would be to ascertain the assets of the Finance Company, which would be the 7677*l.* plus a dividend from the Theatres Company, and then distribute these assets pro ratâ among all the creditors of the Finance Company, including the Theatres Company, and order the Theatres Company to repay the sum by which the 7677*l.* it has already received exceeds its share of dividend.

[*In re Goy & Co.* (1) was also referred to.]

Younger, K.C., and *W. H. Cozens-Hardy*, for the liquidator of the Theatres Company. This is not a question of setting off one debt against the other. The question is as to the dividend the Finance Company are to receive on their proof for 5100*l.*; the Finance Company are not entitled to receive any dividend in respect of this proof until the balance due on the misfeasance judgment has been paid: *Ex parte Theys.* (2) The right way to adjust this claim is to treat as added to the assets of the Theatres Company the balance, 4323*l.*, owing from the Finance Company in respect of the misfeasance; declare a dividend out of these assets among all the creditors, including the Finance Company; do not pay the dividend to the Finance Company, but retain it pro tanto in payment of the 4323*l.*; when this balance has been satisfied the Finance Company will be entitled to receive the dividend on the 5100*l.*, but not before.

Buckmaster, K.C., in reply. The order transferring the assets of the Finance Company, 7677*l.*, to the Theatres Company was made without prejudice to the right to prove against the

(1) [1900] 2 Ch. 149. (2) (1884) 25 Ch. D. 587.

Theatres Company on the debenture; the proof has been allowed at 5100*l.*, but no dividend has ever been paid to the Finance Company in respect of it. The company is the only creditor who has received nothing by way of dividend out of the assets of the Theatres Company, while the other creditors have had 16*s.* 8*d.* in the pound. In consequence of the 7677*l.* transferred to the Theatres Company, the shareholders of that company will get paid in full, whereas the creditors and shareholders of the Finance Company will receive nothing. That is not an equitable distribution of the assets of these two companies.

Cur. adv. vult.

April 22. BUCKLEY J. The Finance Company was wound up in 1898; the Theatres Company was wound up in 1899. At that time there existed a debt owing by the Theatres Company to the Finance Company, which was subsequently proved in April, 1903, at 5100*l.* 11*s.* 2*d.* It was the only debt subsisting as between the two companies. There was no room for any application of mutual credits. Subsequently proceedings were taken which resulted in an order of the Appeal Court of July 11, 1902, under which the Finance Company were held liable for misfeasance, and were ordered to pay the Theatres Company 12,000*l.* As between the 5100*l.* 11*s.* 2*d.* and the 12,000*l.* there could be no set-off. There is no mutual credit, and there is no set-off. That there is no set-off is plain from *Ex parte Pelly*. (1) In that state of facts, in August, 1902, the winding-up of the Finance Company had proceeded to a point at which all proving creditors of the Finance Company had been paid, with the exception of the Theatres Company, who had just established their right to the 12,000*l.*, and the Finance Company had assets of 7677*l.* remaining to be disposed of. On August 26, 1902, an order was made in the winding-up of the Finance Company directing its assets to be transferred to the Theatres Company, and the liquidator of the Finance Company accordingly paid the Theatres Company, or its liquidator, that 7677*l.*, the liquidator of the Theatres Company under-

(1) 21 Ch. D. 492.

BIBL. LONDIN UNIV.

BUCKLEY J.
1904
LEEDS AND HANLEY THEATRES OF VARIETIES, LIMITED, *In re.*

taking to set aside out of it 1000*l.* to provide for any claim for costs of the winding-up of the Finance Company; but this order was to be without prejudice to any rights of the Finance Company to prove in the liquidation of the Theatres Company. In other words, there being, so far as was known, no creditor at all, other than this creditor, the Theatres Company, all the remaining assets of the Finance Company were handed over to the Theatres Company upon the terms that the costs of the winding-up of the Finance Company, so far as not provided for, should be provided for, but it was to remain open to the Finance Company to say "The Theatres Company are still debtors to us." Now the Finance Company did say that, and, as I said before, in April, 1903, they established that they were creditors of the Theatres Company for the 5100*l.* 11*s.* 2*d.* After 1902 there turned up other creditors of the Finance Company, and their debts amount to 5490*l.* They were people who established rights for misrepresentation or misfeasance, or the like. I have, therefore, a Finance Company which has no assets at all, but which has now some new creditors—I mean new in the sense that they came in after all its assets have been disposed of in the way that I have described. Of course they cannot disturb prior dividends, but they are people entitled, if the Finance Company had any money—which it has not—to make a claim for dividends, to the same amount as the Theatres Company have received, before the Theatres Company can get anything more. That is the position in which the Finance Company and its creditors now stand.

In the Theatres Company's liquidation the position is this—they have funds. There is in cash a sum of a little over 600*l.*; there is the 7677*l.* which they received under the order of 1902; and their further asset is this, that they are entitled, as against the Finance Company, to get if they can the balance of their debt of 12,000*l.*—that is, 12,000*l.* less 7677*l.*, making 4323*l.* The assets side of the Theatres balance-sheet for the moment is 600*l.* odd, and 7677*l.* received from the Finance Company, and a claim against the Finance Company for 4323*l.* On the other side their liabilities are a liability to the Finance Company of 5100*l.* 11*s.* 2*d.*, and 4685*l.* 3*s.* 1*d.* to other

people who have proved in the Theatres Company's liquidation. The question is how these assets ought to be administered. The Theatres Company have in fact paid dividends of 16*s.* 8*d.* in the pound out of the 7677*l.* to these other creditors for 4685*l.* 3*s.* 1*d.* But for convenience of statement I will deal with it as if this had not been done.

Now what is the proper way to administer it? In my opinion what I have to do is this. I am administering the assets of the Theatres Company. There is a person, namely, the Finance Company, who is both a debtor to the fund to be administered and a claimant against that fund. I think that that person cannot come and say "I am entitled to a dividend out of the fund" until he has first made complete the fund out of which he says he is entitled to receive payment. I think the words of Cotton L.J. in *Ex parte Theys* (1) apply. The Lord Justice says: "The appellant also relied on this, that the company could say to Hütter, 'You shall not receive anything from the assets till you have paid what you owe us.' Probably the company could effectually say so." Applying that to this case, it means that the Theatres Company can say to the Finance Company, "You shall not receive anything from the Theatres Company's assets till you have paid what you owe to the Theatres Company's fund." In point of fact, of course, the Finance Company cannot pay what they owe to the Theatres Company, because they have no money. They are bare at present, and the only question is whether they can get anything out of their proof against the Theatres Company until they have paid what they owe to the fund. I think not.

The proper administration in my judgment, therefore, is this. Notionally treat the Finance Company as having paid the 4323*l.* to the Theatres Company; take the aggregate notional sum thus arrived at and treat it as applied in payment of a dividend upon all the debts of the Theatres Company—that is to say, upon the 5100*l.* due to the Finance Company and the 4685*l.* due to other people. That will attribute to the Finance Company a certain sum. If that sum be greater than the 4323*l.* that they owe, they will get the difference. If it be

(1) 25 Ch. D. 587, 593.

BUCKLEY J. 1904 LEEDS AND HANLEY THEATRES OF VARIETIES, LIMITED, *In re*.

less, or equal, they will receive nothing. If the dividend thus arrived at on the 4685*l.* cannot be satisfied in full (because the notional sum, of course, is not really paid), then the 4685*l.* would take the whole of the assets of the Theatres Company, although it be less than the notional dividend calculated upon the footing that the Finance Company have paid that which they have not paid.

Solicitors: *Walls & Stallard; G. B. W. Digby.*

W. C. D.

JOYCE J. 1904 *April* 14, 16.

In re VENN. LINDON *v.* INGRAM.

[1903 V. 4.]

Will—Construction—Ambiguity—Explanation by reference to Recital in Codicil—Gift to a Class—Lapse.

In construing a will containing an ambiguity the Court may, for the purpose of explanation, refer to a recital in a codicil, unless it be obviously erroneous.

Darley v. *Martin*, (1853) 13 C. B. 683, and *Grover* v. *Raper*, (1856) 5 W. R. 134, followed.

Testatrix by her will gave all her property upon trust for her niece for life, and after her death to divide the same equally between the brothers and sisters of the said niece living at her decease, and A., B., and C. in equal shares, "and should either be dead leaving children, such children are to take the share their deceased parent would have been entitled to if living."

By a codicil the testatrix recited that by her will she had directed her estate to be divided between the persons therein named, and declared that she desired a certain great-niece to have a share equally with the others named in the will, and bequeathed the same to her accordingly.

A. and B. stood in the same degree of relationship to the testatrix, but C. was a stranger in blood.

A. predeceased both the testatrix and the tenant for life.

B. survived the testatrix, but predeceased the tenant for life:—

Held, (1.) interpreting the will by the recital in the codicil, that the estate went, not in moieties between the brothers and sisters of the tenant for life on the one hand, and the named persons on the other, but equally between them all; (2.) that the gift to A., B., and C. was not contingent upon their surviving the tenant for life, and that consequently B.'s repre-

sentatives were entitled to his share; and (3.) that the gift was not to a class, and that therefore A.'s share lapsed to the next of kin of the testatrix.

ADJOURNED SUMMONS.

Sarah Venn by her will, dated November 18, 1890, after appointing trustees and executors, devised and bequeathed unto her trustees all her real and personal estate upon trust to convert and to pay to her niece Emily Alice Ingram the income arising therefrom for her life, and upon her decease directed her trustees to divide the trust estate "equally between the brothers and sisters of the said Emily Alice Ingram living at her decease, and T. W. Gaze, F. T. B. Gaze, and W. B. Parker in equal shares, and should either of them be dead leaving children, such children are to take the share their deceased parent would have been entitled to if living."

By a codicil to her will, dated June 1, 1893, the testatrix declared as follows: "Whereas in my will I have directed my residuary estate to be sold and the proceeds divided between the persons therein named, now I desire my great-niece Louisa Emilie Ingram to have a share in my said residuary estate equally with the others named in the said will, and I bequeath her the same accordingly. In all other respects I confirm the said will."

The testatrix died on August 7, 1901.

T. W. Gaze and F. T. B. Gaze were in the same degree of relationship to the testatrix, but W. B. Parker was a stranger in blood. T. W. Gaze predeceased the testatrix. F. T. B. Gaze survived her, but died in the lifetime of Emily Alice Ingram, the tenant for life. E. A. Ingram died in 1902, leaving only one brother and W. B. Parker her surviving.

This summons was taken out by the trustees to have it determined who, in the events which had happened, were entitled to the residuary estate of the testatrix.

Burt, for the summons.

Fawcus, for the surviving brother of the tenant for life. The estate is divisible into moieties of which I take one, and the great-niece named in the codicil takes a share only in the other moiety with the three persons named in the will. But

JOYCE J. 1904 VENN, *In re.* LINDON *v.* INGRAM.

if the whole estate is divisible in equal shares, amongst all, then surviving the tenant for life is a condition of sharing in the case of the persons named just as much as in the case of the brothers and sisters of the tenant for life, and the estate of F. T. B. Gaze is therefore not entitled to a share. The words "the share their deceased parent would have been entitled to" shew that this is the true construction.

R. M. Pattisson, for the legal personal representatives of F. T. B. Gaze. The testatrix did not intend to divide the estate into moieties. This is clear even on the will, but, if necessary, the codicil can be referred to, and that makes the matter clear. There is nothing in the will to make surviving the tenant for life a condition of taking a share, except in the case of the tenant for life's brothers and sisters.

G. S. Alexander, for W. B. Parker and for the representatives of T. W. Gaze. I submit that F. T. B. Gaze's estate does not share because he died before the tenant for life. With regard to the share of T. W. Gaze, I contend that the gift is one to a class, and that his share therefore did not lapse. The older cases may favour the view that some blood or other tie between the named individual and the class is necessary to a class gift; but in *In re Moss, Kingsbury* v. *Walter* (1), Romer L.J. lays down the principle that a gift to a class properly so called and a named individual equally is primâ facie a gift to a class. No doubt when the same case came before the House of Lords (2) Lord Davey disapproved of Romer L.J.'s statement; but the House affirmed the decision of the Court of Appeal in which that statement was made, and it was not argued before the House; and I contend that Lord Davey's disapproval must be treated as a dictum only.

Fawcus, in reply.

JOYCE J. The question in this case is as to the mode in which the residuary estate of the testatrix is to be distributed among the persons named or referred to in her will and first codicil. [His Lordship read the material passage from the will and the recital in the codicil, and continued:—] Various difficulties have arisen. The first question is, whether the

(1) [1899] 2 Ch. 314. (2) [1901] A. C. 187, 193.

trust estate is to be divided in moieties, one moiety going to the surviving brothers and sisters of the tenant for life, and the other one to the persons particularly named in the will, together with the great-niece named in the codicil, or whether it is divisible in equal shares between all those persons. Taking the will alone, I think the true construction thereof is that the division is not to be in moieties, but equally between all entitled. I admit, however, that on the will alone there is an ambiguity as to this, and that it is well arguable that the testatrix intended the division to be in moieties. If, however, I may refer to the first codicil to clear up the ambiguity, there is no doubt but that the estate is to be divided equally among all the beneficiaries. If there were an obviously erroneous recital of the will in the codicil, that would not alter the construction of the will: see *Skerratt* v. *Oakley* (1); but if the recital in the codicil be not obviously erroneous, I have no doubt that I may refer to the codicil to clear up an ambiguity in the will. The principal authority for this is *Darley* v. *Martin*. (2) There Jervis C.J., in delivering the considered judgment of the Court of Common Pleas, says (3): "And, as to the effect of the codicil, it was argued, that an erroneous reference in a codicil to the disposition of the will, cannot constitute a new bequest in opposition to the will: and *Skerratt* v. *Oakley* (1) was relied on. But it appears to us that the argument with respect to the effect of the codicil, when rightly considered, is not that the will is at all revoked or varied by the codicil; but, rather, that, the will and codicil being all one testament, the language of the will may be interpreted by that of the codicil; and that, accordingly, the gift over in the will, in default of such issue, being capable of importing a bequest over on failure of issue living at the death, it ought to be inferred that the testator employed it in that sense, because, in the codicil, he refers to it as if it were a gift over in default of his daughter's leaving no issue, which, as regards personalty, is tantamount to a gift on failure of issue living at her death. The argument, thus viewed, appears to us to be well founded."

(1) (1798) 7 T. R. 492; 4 R. R. 504.
(2) 13 C. B. 683.
(3) 13 C. B. 690.

JOYCE, J. 1904 VENN, *In re.* LINDON v. INGRAM.

But the authorities do not rest there, for Kindersley V.-C., than whom a more careful or accurate judge never existed, did the same thing in *Grover* v. *Raper*. (1) In that case there was an ambiguity in the words of the will; and the Vice-Chancellor, after expressing the inclination of his opinion as to the meaning of the will, said that the codicil, however, put the matter beyond all doubt. I think therefore that, following the considered judgment of the Court of Common Pleas in *Darley* v. *Martin* (2) and this decision of Kindersley V.-C., I may have recourse to the codicil to clear up the ambiguity in the will; and I hold, therefore, that the testatrix's residuary estate is divisible in equal shares among all who take.

One of the persons particularly named, F. T. B. Gaze, died after the testatrix, but in the lifetime of the tenant for life. It is contended that his representatives are not entitled to share, on the ground that on the true construction of the will the gift is contingent on his surviving the tenant for life. There is not a word in the will to that effect, though no doubt the testatrix uses the expression "would have been entitled to." This, however, is not enough for the purpose, especially as the supposed gift over would, in my opinion, apply equally in case of death in the lifetime of the testatrix. I therefore hold that F. T. B. Gaze's representatives are entitled to a share.

Then another point arises. T. W. Gaze died in the lifetime of the testatrix, and I have to determine what becomes of his share. Does it lapse to the next of kin, or does it pass to the other legatees? Having carefully read and considered the judgments of the House of Lords in *Kingsbury* v. *Walter* (3), I am of opinion that the gift in question here cannot be construed as a class gift. The persons to take have no common quality or characteristic except that of being residuary legatees. I therefore hold that T. W. Gaze's share has lapsed to the testatrix's next of kin.

Solicitors: *Lewis & Sons; Mason & Co.*

(1) 5 W. R. 134. (2) 13 C. B. 683.
(3) [1901] A. C. 187.

G. A. S.

LEA *v.* THURSBY.

SWINFEN EADY J.

[1903 L. 1322.]

1904

April 25, 26, 29.

Bankruptcy—Jurisdiction—County Court—Claim arising out of the Bankruptcy — Lease — Disclaimer — Mortgagees by Demise — Option to take Vesting Order or be excluded—Application by Landlord — Question of Merger—Intention—Evidence—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 102, *sub-s.* 1.

Where a lessee is adjudicated bankrupt in a county court, and his trustee disclaims the lease, an application by the landlord for an order putting mortgagees by demise to their election to take a vesting order of the lease cum onere, or be excluded from all interest, is an application to enforce a claim arising out of the bankruptcy, which could not have been enforced by action in the High Court prior to the Bankruptcy Act, 1883, and therefore by virtue of s. 102, sub-s. 1, the county court has jurisdiction, without any consent of the parties, to decide all questions of law or fact arising on the application, including the question whether the lease is subsisting, or whether it was merged by a temporary coalescence of the freehold and leasehold estates in the lessee.

The lessee's intention to prevent merger may be gathered (inter alia) from his dealings with the property subsequent to the date of coalescence.

WITNESS ACTION.

By a lease dated August 20, 1880, Worthington demised certain land (except the timber, mines, and minerals) to Milward for the term of ninety-five years from March 25, 1880, at the rent of 222*l.* 5*s.* 6*d.*

By a mortgage dated June 24, 1881, Milward sub-demised the premises to Horsfall for the residue of the term of ninety-five years less three days at a peppercorn rent to secure 2000*l.* and further advances.

Three further advances of 2000*l.* were made on September 29, 1881, December 27, 1881, and March 27, 1882, respectively, bringing the total debt up to 8000*l.*, and receipts stating these sums to be "due on the security of these presents" were indorsed by Milward on the mortgage. This mortgage subsequently became vested in the plaintiffs, the trustees of Horsfall's will.

On March 27, 1882, the date of the last further advance, the

SWINFEN EADY J.

1904

LEA v. THURSBY.

freehold reversion on the lease of August 20, 1880, was conveyed with other property to Milward subject to and with the benefit of the lease, 8272*l.* being paid for the entire property.

On August 1, 1885, Milward conveyed the entire property to Farnham for 7500*l.* subject to the lease of August 20, 1880, and subject to an agreement by Farnham to grant Milward a lease of the entire property for the term of 500 years from March 25, 1885, at a rent of 300*l.* This lease was granted on the same day, August 1, 1885, and was expressly subject to the lease of August 20, 1880.

The entire property was subsequently mortgaged by Farnham, and on May 31, 1895, it was conveyed by Farnham's mortgagees to the defendant Thursby for 6000*l.* subject to Milward's lease of August 1, 1885. The conveyance contained a recital that the lease of August 20, 1880, had not merged, and Milward, who was not a party, made a statutory declaration to that effect.

Horsfall's mortgage was not referred to in any of the later deeds.

On July 8, 1902, a bankruptcy petition was filed and a receiving order made against Milward in the Birmingham County Court. He was subsequently adjudicated a bankrupt, and a trustee of his estate was appointed.

On October 18, 1902, the trustee gave the plaintiffs and the defendant Thursby due notice in Form 119 B of his intention to disclaim the leases of August 20, 1880, and August 1, 1885; and on November 11, 1902, the plaintiffs and the defendant Thursby not having required the matter to be brought before the Court, he formally disclaimed those leases.

On December 23, 1902, the defendant Thursby served a notice of motion in bankruptcy on the plaintiffs, asking for an order that, unless the plaintiffs elected to have the property comprised in the lease of August 20, 1880, vested in them subject to the rent, covenants, and conditions contained in that lease and to the same liabilities and obligations as the bankrupt was subject to under the lease at the date when the bankruptcy petition was filed, they should be excluded from all interest in the property, and that it should be delivered to

and vested in the defendant Thursby free from the interest of any person claiming under the bankrupt.

The plaintiffs took the objection that the lease had merged in the fee; but the registrar held it was still subsisting, and on May 5, 1903, made the order in the terms of the notice of motion giving the plaintiffs seven days to declare their election to take a vesting order, which they declined to do, and ordering them to pay the costs of the motion.

On June 23, 1903, the plaintiffs, who had not appealed from this order, brought this action, claiming a declaration that the term created by the lease of August 20, 1880, had merged in the fee, and that they were entitled to the premises for the residue of the sub-term created by their mortgage at a peppercorn rent subject to the equity of redemption thereunder.

The defendant Thursby relied on the registrar's decision as concluding the point, and submitted in the alternative that there was no merger.

Milward died in September, 1903.

Micklem, K.C., and *W. C. Druce*, for the plaintiffs. The plaintiffs are not estopped by the registrar's decision, as he could only make the vesting order quantum valeat, and had no jurisdiction to decide the question of merger without the plaintiffs' consent.

The jurisdiction to decide questions of law or fact is given by s. 102, sub-s. 1, of the Bankruptcy Act, 1883, which provides as follows: "Subject to the provisions of this Act, every Court having jurisdiction in bankruptcy under this Act shall have full power to decide all questions of priorities, and all other questions whatsoever, whether of law or fact, which may arise in any case of bankruptcy coming within the cognizance of the Court, or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case.

"Provided that the jurisdiction hereby given shall not be exercised by the county court for the purpose of adjudicating upon any claim, not arising out of the bankruptcy, which

SWINFEN EADY J.
1904
LEA v. THURSBY.

might heretofore have been enforced by action in the High Court, unless all parties to the proceeding consent thereto, or the money, money's worth, or right in dispute does not in the opinion of the judge exceed in value two hundred pounds."

Apart from the proviso, the registrar might possibly have given himself jurisdiction by deeming it expedient or necessary to decide the question of merger for the purpose of doing complete justice, or making a complete distribution of the property: *Halliday* v. *Harris.* (1)

But the proviso precluded him from adjudicating upon any claim "not arising out of the bankruptcy, which might heretofore have been enforced by action in the High Court," unless the parties consented.

Now the question of merger had nothing whatever to do with the bankruptcy. It arose on March 27, 1882, when Milward purchased the freehold, and the plaintiffs' claim to a term mortgage on the fee could have been enforced at any time by action in the High Court.

The trustee, having disclaimed the lease, had no interest in the matter. It was simply a claim between third parties which the registrar had no jurisdiction to entertain: *In re Lowenthal.* (2)

The vesting order could, therefore, only operate quantum valeat. If the lease was subsisting, it was an order to which the plaintiffs could not object; if merged, it was inoperative. The plaintiffs had, therefore, no ground for appealing or applying for a prohibition, as they were not injured by the order, which was a mere vesting order, and contained no declaration that the lease was subsisting.

On the merits of the case, it is submitted that the lease merged and the mortgage term fastened on the fee. This would have clearly been so at common law, and the result is the same since the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25, sub-s. 4, unless it was the intention, interest, or duty of Milward to keep the lease alive: *Capital and Counties Bank* v. *Rhodes* (3); *Ingle* v. *Vaughan Jenkins.* (4)

(1) (1874) L. R. 9 C. P. 668.
(2) (1884) 13 Q. B. D. 238, 241.
(3) [1903] 1 Ch. 631, 652.
(4) [1900] 2 Ch. 368.

That point must be determined as on March 27, 1882, when the estates coalesced, and without reference to the subsequent transactions. The conveyance was in common form, and there was nothing in the transaction to shew any intention, interest, or duty of Milward to prevent merger, and to become landlord and tenant of the property. The lease, therefore, merged.

Haldane, K.C., and *A. F. Wootten*, for the defendant Thursby. On an application for a vesting order under the Bankruptcy Act, 1883, s. 55, as amended by the Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 13, the registrar does not act ministerially, but exercises a judicial discretion: *In re Britton* (1); *In re Smith* (2); *In re Walker* (3); and it is clear that he cannot make an order quantum valeat, but must first decide whether or not the lease exists.

In re Lowenthal (4), which is probably founded on a dictum in *Ellis* v. *Silber* (5), is the only case in which it has been held that the Bankruptcy Court had no jurisdiction to decide a question of law or fact, though there are many cases in which it has been held that it ought not to have exercised its jurisdiction.

In the present case the question of merger arose on the claim for the vesting order—an order which the Bankruptcy Court alone could make. That claim arose out of the bankruptcy, and could not have been enforced in the High Court prior to the Bankruptcy Act, 1883. The proviso to s. 102, sub-s. 1, was, therefore, inapplicable, and no consent to the jurisdiction was necessary. The plaintiffs are, therefore, estopped by the registrar's decision.

As to the merits, if still open, merger is a question of intention, interest, and duty: *Capital and Counties Bank* v. *Rhodes* (6); *Thellusson* v. *Liddard*. (7) Now Milward's intention to keep the lease alive is shewn by his signing a further charge on the day he obtained the freehold. Again, the freehold

(1) (1889) 37 W. R. 621.
(2) (1890) 25 Q. B. D. 536.
(3) (1895) 2 Manson, 60.
(4) 13 Q. B. D. 238, 241.
(5) (1872) L. R. 8 Ch. 83, 86.
(6) [1903] 1 Ch. 631, 652.
(7) [1900] 2 Ch. 635.

SWINFEN EADY J.

1904

LEA v. THURSBY.

was conveyed to him subject to and with the benefit of the lease.

[SWINFEN EADY J. That is scarcely evidence of intention, as it is the usual and proper mode of conveying a freehold reversion.]

The existence of the lease was recognised in the subsequent transactions. It is the common practice to treat subsequent transactions as evidence of intention in merger cases, e.g., *Grice* v. *Shaw* (1), just as the language of a later statute is treated as evidence of the Legislature's intention in a previous statute, or the act of flying from justice is treated as evidence of a previous mens rea.

It was clearly to Milward's interest to keep the lease alive, as he could not only deal with the timber, mines, and minerals, but with the freehold reversion generally without the consent of the mortgagees. It would have been greatly against his interest to allow the onerous lease to merge, and give the mortgagees thereof a long term at a peppercorn rent. If he had done this, the subsequent conveyance to Farnham would have been a fraud. There was, therefore, no merger.

Micklem, K.C., in reply.

Cur. adv. vult.

April 29. SWINFEN EADY J. It is clear that if the lease of August 20, 1880, was a subsisting lease and had not been merged or extinguished at the date of the bankruptcy petition, the defendant Thursby was entitled to apply to the Bankruptcy Court for the vesting order. This right is conferred by s. 55 of the Bankruptcy Act, 1883. It has been decided that, under this section, the landlord may apply that the mortgagee shall take a vesting order or be excluded from all interest in the disclaimed property: *In re Finley* (2); see also *In re Baker*. (3)

The Court to which this application was made was the only Court having jurisdiction in the matter, namely, the Birmingham County Court, in which the bankruptcy proceedings against Milward were then pending. Upon the hearing of this

(1) (1852) 10 Hare, 76. (2) (1888) 21 Q. B. D. 475.
(3) [1901] 2 K. B. 628.

application the question arose whether the lease of August 20, 1880, was subsisting or had been merged. Upon the evidence before me it appears that the Court deemed it expedient or necessary to decide that question for the purpose of doing complete justice. The right of the defendant Thursby to apply for and obtain a vesting order (assuming always that the lease was subsisting at the date of the bankruptcy petition) was a right or claim arising out of the bankruptcy of Milward and the subsequent disclaimer by the trustee, and could only have been enforced by him in the Bankruptcy Court, and certainly could not, before the passing of the Bankruptcy Act, 1883, have been enforced by action in the High Court within the meaning of the proviso in s. 102, sub-s. 1, of the Bankruptcy Act, 1883, and the consent of all parties to the county court exercising jurisdiction was not necessary. In my opinion the county court in bankruptcy had full jurisdiction under s. 102 of the Bankruptcy Act, 1883, to decide upon the claim of the defendant Thursby and all questions of law or fact arising thereon, including the question whether the lease of August 20, 1880, was subsisting or had been merged by the conveyance in fee of March 27, 1882.

What took place before the registrar was this. There was first a preliminary discussion, upon the effect of which the parties are not agreed. The plaintiffs contend that the question was raised as to the jurisdiction of the registrar to decide the question of merger; the recollection of the defendant Thursby's counsel, Mr. Wootten—who was present before the registrar—is that the only question raised was whether the registrar had jurisdiction to dispose of the defendant Thursby's application or whether it should be adjourned to the judge. I believe that Mr. Wootten's recollection is the more accurate, and this is quite consistent with the evidence given by the plaintiffs' solicitor, Mr. Tom Hadley, of what he heard stated by his counsel to the registrar. The point, however, is not of importance, as the defendant Thursby does not rely on any consent as giving jurisdiction to the county court.

The registrar stated that he certainly had jurisdiction, and proceeded to deal with the matter. It is common ground between the parties that the question whether there had been

SWINFEN EADY J.

1904

LEA v. THURSBY.

a merger of the lease or whether it was subsisting at the date of the bankruptcy petition was fully and elaborately argued before the registrar. The first hearing was on January 30, 1903; and upon its being represented to the registrar that the case then pending and since decided and reported, namely, *Capital and Counties Bank* v. *Rhodes* (1), would probably affect the matter under consideration, he adjourned the further hearing until that case had been decided. After that case had been decided and reported, the adjourned hearing of the defendant Thursby's application took place, namely, on May 5, 1903; and the registrar then made the order of that date. According to Mr. Wootten's recollection the registrar said: "I do not think there was a merger—I shall make the order in the terms of the notice of motion." The defendant Thursby then applied for and obtained an order for the payment of the costs of the application by the present plaintiffs, who had throughout resisted the motion.

Having regard to s. 13 of the Bankruptcy Act, 1890, and to the cases of *In re Britton* (2) and *In re Smith* (3), it seems clear that the Court of Bankruptcy is exercising a judicial discretion, and not merely acting ministerially in dealing with applications for vesting orders. The Bankruptcy Court has so dealt with the defendant Thursby's application on its merits and has made an order, and has, in fact, decided that the lease was not merged. The plaintiffs deliberately determined not to appeal from this decision; and in my judgment they are estopped by the proceedings in the Bankruptcy Court, and cannot have the merits tried over again in this Court.

I may add that even if the plaintiffs were entitled to have the matter decided again on the merits, my judgment would be that the lease was subsisting at the date of the bankruptcy petition and had not merged in the inheritance. The law as to merger is summed up by Cozens-Hardy L.J. in *Capital and Counties Bank* v. *Rhodes*. (4) He says: "The Courts of Equity . . . . had regard to the intention of the parties, and, in the absence of any direct evidence of intention, they pre-

(1) [1903] 1 Ch. 631.
(2) 37 W. R. 621.
(3) 25 Q. B. D. 536.
(4) [1903] 1 Ch. 652, 653.

sumed that merger was not intended, if it was to the interest of the party, or only consistent with the duty of the party, that merger should not take place. . . . A Court of Equity had regard to the intention of the parties, to the duty of the parties, and to the contract of the parties, in determining whether a term was to be treated as merged in the freehold."

Since the Judicature Act, 1873, if there would have been no merger in equity, there is now no merger at law. In my opinion it was for the benefit of Milward that the term should not merge upon the conveyance of the freehold reversion. Such a merger would have fettered his own dealing with the property he had just bought. If there was no merger he could sell it, mortgage it, or otherwise deal with it as he pleased without paying off the mortgagee of the term and without his concurrence. Seeing that the timber and mines were reserved to the reversioners when the lease of August 20, 1880, was granted, he could have dealt with those items without the concurrence of the mortgagee of the term. Again, on the very date on which he obtained a conveyance of the reversion—March 27, 1882—he signed a further charge indorsed on the mortgage of the term for 2000*l.*, bringing up the whole loan on the term to 8000*l.* There is no reference to the freehold reversion, or to the term being merged in the inheritance, but by further charging the term he indicated an intention of keeping it subsisting. The subsequent dealings by Milward with the property clearly shew that he then treated the term as still subsisting, and the parties dealt with him on the footing that it was subsisting. The conveyance by Milward to Farnham of August 1, 1885, is a conveyance of the reversion expressly subject to and with the benefit of the term created by the deed of August 20, 1880. The conclusion I have come to is that it was for the benefit of Milward, and it was the intention of Milward that the term should be kept alive.

The result is that the plaintiffs' claim fails and substantial justice is done between the parties. The plaintiffs advanced 8000*l.* on a leasehold interest, which (it now appears) is of no value, and, having declined to accept the lease subject to rent and covenants, they now have no security for their money.

SWINFEN EADY J.
1904
LEA v. THURSBY.

But they could have had, if they had wished, the whole estate and interest of the bankrupt in the lease. They do not gain the windfall which they hoped had fallen to their lot. On the other hand, the defendant Thursby, who bought the freehold for 6000*l.*, free from incumbrance, does not suffer the injustice of having a first mortgage for 8000*l.* charged upon the premises in priority to his interest. The action is dismissed with costs.

Solicitors: *Hadley & Dain; Robins, Hay, Waters & Hay.*

G. R. A.

WARRINGTON J.
1904
April 27, 28.

In re WHEELER. HANKINSON *v.* HAYTER.

[1903 W. 980.]

Married Woman—Separate Estate—Contract—Acknowledgment of Loan made but not creating Debt—Married Women's Property Act, 1893 (56 & 57 *Vict. c.* 63), *s.* 1—*Executor—Retainer—Debt—Ready Money—Money on Deposit.*

Under s. 1 of the Married Women's Property Act, 1893, in order to bind the separate estate of a married woman there must be a contract by her entered into after the passing of the Act, and then entered into for the first time. An acknowledgment since the Act of the fact that the married woman had had moneys advanced to her prior to the Act, but for which she was under no liability, having had no separate estate at the time of the advance, even if the acknowledgment is in such terms as would make a debt recoverable though barred by the Statute of Limitations, is not sufficient to render her liable to repay such advances.

The right of an executor to retain or set off the share of one of the next of kin in the estate under a partial intestacy against a debt owing by him to the estate, notwithstanding that it is barred by the Statute of Limitations, depends upon whether there was due from the legatee a debt for which but for the Statute of Limitations he could have been sued.

Money on deposit at a bank withdrawable at fourteen days' notice is not ready money.

Mayne v. *Mayne*, [1897] 1 I. R. 324, followed.

SUMMONS.

By his will dated June 24, 1897, Mr. Wheeler gave certain property to his trustees upon trust for sale, and out of the money arising from any such sale and out of his ready money

to pay his debts and funeral and testamentary expenses, and upon trust to divide the balance of the said moneys and his ready money into four equal parts, and to stand possessed of such parts on trusts therein mentioned for the benefit of his daughters and their issue; and he divided other property in specific portions amongst his four daughters and their issue. In 1897, 1898, and 1900 he added codicils to his will, but neither the will nor the codicils contained any hotchpot clause or residuary devise or bequest.

The testator died on September 6, 1902. It was alleged that during his lifetime he had made advances to Mrs. Constance Hayter, one of his daughters, to the amount of 1784*l.*, and that she had not repaid any of these advances either to him or to his executor. On August 6, 1894, she "signed as correct" a document headed "Summary of Constance's Account," which gave particulars of various advances made by the testator to her or her husband, including two which amounted with interest to 600*l.* and 122*l.*, and which she admitted were made to her. She married her present husband in 1880. She stated that some of the advances were made to her husband, and that as to those which were made to her they were made prior to 1890, and that at the time they were made she had no separate estate. She further stated that by signing the document above mentioned she never intended to admit that the testator had any claim enforceable against her personally. The testator's executor admitted that Mrs. Hayter's debts were barred by the Statute of Limitations, but contended that by signing the document of August 6, 1894, she had, although the document being more than six years old would not prevent the operation of the Statute of Limitations, entered into a contract which would bind her separate estate within s. 1 of the Married Women's Property Act, 1893. He therefore claimed that she should bring into account the amount of the advances as against a share of the estate, of which the testator died intestate and which she took as one of his next of kin.

Part of the testator's estate consisted of a sum of 1011*l.* 7*s.*, which was on deposit at a bank and could be withdrawn on

WARRINGTON J.

1904

WHEELER, *In re.* HANKINSON *v.* HAYTER.

giving fourteen days' notice. A question arose whether this passed under the gift of ready money or was undisposed of.

W. J. Lewin, for the executor.

Norton, K.C., and *W. J. Whittaker*, for Mrs. Hayter. None of the advances made by the testator to Mrs. Hayter were debts for which she could have been sued. They were either made to her husband or were gifts to her. Even if they were loans to her, she was a married woman with no separate estate when she received them, and was not liable to repay them, so she cannot be called upon to account for them.

Christopher James, for Mrs. Williams, another of the testator's daughters, took the same view.

Rowden, K.C., and *Cozens-Hardy*, for Mrs. Asheton, another daughter of the testator. The advances were debts in the ordinary sense which Mrs. Hayter was liable to pay. We admit that those debts were statute-barred. The document of August 6, 1894, was a good acknowledgment of the debts within the Statute of Limitations, but owing to the date we cannot rely on it for that purpose. We do, however, rely upon it with another object. It was signed after the Married Women's Property Act, 1893, came into operation, and was a contract by her within s. 1 of that Act: Wolstenholme on the Conveyancing and Settled Land Acts, 8th ed. p. 292. Mrs. Hayter acknowledged her liability, and that gives the executor the power to retain or set off the amount out of her share in the estate whether under the will or of property which is undisposed of, even though her liability was something short of a legal debt. The power to retain exists although the debts are statute-barred. If legatees claim against an estate, they must account for everything they have received from the testator: *In re Akerman* (1), which followed *Courtenay* v. *Williams* (2) and *Cherry* v. *Boultbee*. (3) There is money in this case which can be retained.

[WARRINGTON J. It is pointed out by Kekewich J. that to apply that doctrine there must have been a debt, even though it is statute-barred.]

(1) [1891] 3 Ch. 212. (2) (1844) 3 Hare, 539; 64 R. R. 403.
(3) (1839) 4 My. & Cr. 442; 48 R. R. 150.

But it need not have been legally enforceable.

Bryan Farrer, for Mrs. Johnston, another daughter, supported the same contention. [He referred to *Courtenay* v. *Williams*. (1)]

Norton, K.C., in reply. To come within s. 1 of the Married Women's Property Act, 1893, it must be proved that a contract has been entered into. The document of August 6, 1894, is not a contract. There was no debt to be acknowledged. To make that which was before the 1893 Act not a debt into a debt fresh consideration would be required. Here there was none.

WARRINGTON J. stated the facts, and held that the advances except the two sums of 600*l.* and 122*l.*, which were admitted to have been advanced to Mrs. Hayter, were not made to her, and that she could not have been sued therefor. His Lordship continued:—As to the 600*l.* and 122*l.*, I cannot hold that, independently of what I am now going to say, there was any debt due by Mrs. Hayter to the testator. If she had been a single woman, or if she had been possessed of separate estate at the time the advances were made to her, there would have been a liability on her part to pay the 600*l.* and the 122*l.* But she was not possessed of any separate estate. Therefore at the time the advances were made and up to 1894 she could not have been sued in respect of the 600*l.* or the 122*l.* But in 1893 the Married Women's Property Act of that year was passed, and by s. 1 provided that—"Every contract hereafter entered into by a married woman, otherwise than as agent, (*a*) shall be deemed to be a contract entered into by her with respect to and to bind her separate property whether she is or is not in fact possessed of or entitled to any separate property at the time when she enters into such contract; (*b*) shall bind all separate property which she may at that time or thereafter be possessed of or entitled to; and (*c*) shall also be enforceable by process of law against all property which she may thereafter while discovert be possessed of or entitled to." It is said that the document

(1) 3 Hare, 539, 554; 64 R. R. 403, 413.

WARRINGTON J.
1904
WHEELER, *In re.* HANKINSON *v.* HAYTER.

of August 6, 1894, which was signed by Mrs. Hayter after the passing of that Act, amounted to a contract within the meaning of that section, and that therefore she is liable in respect of the 600*l.* and the 122*l.* Mr. Rowden submitted the point to me in this way. He said there were debts in existence at the date when the Act was passed, but debts for which the testator could not have brought an action; and that if after the passing of the Act one could find that which under the Statute of Limitations would be a good acknowledgment of the debts, that would be sufficient to constitute a contract under s. 1 of that Act. Further, he said that the document of August 6, 1894, would satisfy that condition, and that therefore there was a sufficient contract after the date of the Act to enable the previous debts to be recovered, although that document did not by itself, as I have already held, amount to an obligation covering the whole of the indebtedness. In my opinion that is not the correct view of this statute. It seems to me that for the purposes of the Act you must find a contract entered into by the married woman after the date of the Act. It is not sufficient to find an acknowledgment of a pre-existing debt, even although that acknowledgment may be in such terms as would be sufficient to take the indebtedness out of the Statute of Limitations. I have already read the section, and it appears to me quite plain that what it contemplates is a contract entered into by a married woman and a contract then entered into for the first time. If that view is correct it is clear that there is no contract in this case sufficient to form the ground of action against the married woman for payment of this 600*l.* and 122*l.* In the first place, there is no fresh consideration, and that would be amply sufficient to enable me to decide this point; but even if there were some consideration the terms of the document are not in my opinion sufficient to amount to a fresh promise to pay the debts. I hold, therefore, that with respect to all the sums referred to in the document of August 6, 1894, there is not and never was any debt for which Mrs. Hayter could be sued. I need not trouble about the Statute of Limitations, for it is admitted that these advances if they were debts would be barred by the statute.

Then comes a further question. If there is no debt for which Mrs. Hayter can be sued, is there any right of the executor to retain out of the benefits which Mrs. Hayter will take in the testator's estate? It has been contended, and *In re Akerman* (1) has been cited for the proposition, that, although there was no debt for which Mrs. Hayter could be sued, the executor is entitled to retain the money from the money coming to her out of that part of the testator's estate which is undisposed of. I quite agree that, if there is a debt due by a legatee or one of the next of kin, a debt in the proper sense of the word, but the remedy for the debt is barred by the Statute of Limitations, the executors would be entitled to retain funds in respect of that debt, although it was barred by the statute; but it seems to me that for the purpose of applying that proposition you have first to find that the legatee in question owes money to the estate. In *In re Akerman* (1) Kekewich J. in giving judgment states the principle thus (2): "A person who owes an estate money, that is to say, who is bound to increase the general mass of the estate by a contribution of his own, cannot claim an aliquot share given to him out of that mass without first making the contribution which completes it." I have already held that there was no obligation on Mrs. Hayter to repay these sums which were advanced to her husband, and that in respect of the sums as to which she was under an obligation she was not legally bound to pay them, because she was a married woman with no separate estate. Therefore, in my opinion, the executor has no right of retainer.

[His Lordship further held, following *Mayne* v. *Mayne* (3), that the money on deposit was not ready money and was undisposed of.]

Solicitors: *C. F. Ingram, for C. J. Lacey, Bournemouth; Balderston & Warrens; Cox & Lafone; Lowe & Co.*

(1) [1891] 3 Ch. 212. (2) [1891] 3 Ch. 219.
(3) [1897] 1 I. R. 324.

H. C. R.

WARRINGTON J.

1904

April 28.

In re LORD STAFFORD'S SETTLEMENT AND WILL. GERARD *v.* STAFFORD.

[1903 S. 336.]

Settled Land—Compound Settlement—Heirlooms—Sale—Application of Proceeds—Discharge of Incumbrances—Heirlooms vested in Tenant in Tail—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 37, *sub-ss.* 1, 2; *s.* 2, *sub-s.* 9; *s.* 21, *clause* (*ii.*); *s.* 53.

The Costessey Hall estates were settled by a deed of January 26, 1874, under which Lord Stafford was tenant for life in possession. By the will of the late Lord Stafford he bequeathed certain pictures upon trust to permit the same to be used and enjoyed by the person who under the settlement of 1874 should for the time being be entitled to the Costessey Hall estates, to be held as heirlooms for the successive owners of the hall, but not to vest absolutely in any tenant in tail male by purchase who should not attain the age of twenty-one years or die under that age leaving issue male. The testator died in 1884. One of the pictures bequeathed as heirlooms had been recently sold for a large sum of money. The money was paid to the trustees of the will and invested by them in Consols. Byrne J. held that the settlement was a compound settlement, and he appointed the trustees of the will to be trustees for the purposes of the Settled Land Acts of the settlement of the heirlooms and the proceeds of sale thereof created by the deed of 1874 and the will. The heirlooms were now vested in an infant female tenant in tail in remainder. The tenant for life asked that the trustees of the compound settlement should apply 15,000*l.*, part of the proceeds of sale of the picture, in discharge of a mortgage on land settled by the deed of 1874:—

Held, that the effect of the order of Byrne J. was that both the land settled by the deed of 1874 and the heirlooms must be treated as if they had been settled by the same document; that the words "land" in s. 37 and "settled land" in s. 21, clause (ii.), of the Settled Land Act, 1882, meant the land by reference to the limitations of which the heirlooms were settled by the will; that the slight difference in the limitations of the deed and the will, and the fact that the heirlooms were vested in the tenant in tail, were not sufficient ground for distinguishing *In re Duke of Marlborough's Settlement*, (1885) 30 Ch. D. 127; (1886) 32 Ch. D. 1; that the investment in Consols by the trustees before they were appointed trustees of the compound settlement did not prevent the desired application of the money; that the tenant for life, although a trustee under s. 53, was not committing a breach of trust; and that the money ought to be applied in the discharge of the mortgage.

UNDER a settlement of January 26, 1874, the estates of Costessey Hall stood limited in the events which had happened

to the present Lord Stafford, as tenant for life in possession with remainders in strict settlement on divers persons for life with remainder in tail, with an ultimate limitation in fee to the late Lord Stafford. The present first tenant in tail in remainder was Wilhelmina Margery Chichele Plowden, an infant.

By the will of Henry Valentine, Lord Stafford, dated August 23, 1884, he bequeathed certain pictures and other chattels at Costessey to the trustees of his will upon trust (except in an event which did not happen) to permit the same to be used and enjoyed by the person who by virtue of or under the limitations contained in the settlement of 1874 should for the time be entitled to the said hall and estate at Costessey, to the end and intent that, as far as the rules of law and equity would admit, the same might be and go and be held as heirlooms with Costessey Hall for the benefit of the successive owners of the said hall under the limitations aforesaid, but so that for the effect and purpose of transmission the same should not vest absolutely in any tenant in tail male by purchase of the said hall and estate under the limitations of the said settlements or either of them who should not attain the age of twenty-one years, or depart this life under that age leaving issue male of his body living at the time of his decease or born in due time afterwards, and also that, in the event of the testator leaving no son and no daughter surviving him, his nephew and heir-presumptive, Augustus Fitzherbert Stafford Jerningham, if he should survive him, should be only entitled during his life to the use of the aforesaid articles and things, and subject to such right of user the same should go and be enjoyed as if he had died in the testator's lifetime.

The testator died on November 30, 1884, possessed of the pictures and other heirlooms mentioned in the will. Amongst the heirlooms was a portrait of Lady Stafford (commonly known as Mrs. Jerningham) as Hebe, painted by Hoppner. In June, 1902, this picture was sold, subject to the sanction of the Court, for 23,100*l*. By an order of July 9, 1902, made by Buckley J., the sale was approved, and his Lordship being of opinion that the trustees of the will were the proper persons to receive the purchase-money, it was ordered that they should,

WARRINGTON J.

1904

LORD STAFFORD'S SETTLEMENT AND WILL, *In re.* GERARD *v.* STAFFORD.

out of the said sum when received, make certain payments for costs and otherwise. The trustees received the money, made the payments, and invested the balance of 22,329*l.* 4*s.* 9*d.* in Consols.

On January 27, 1903, Lord Stafford, the present tenant for life in possession of the Costessey estates and of the heirlooms, took out a summons asking that the trustees of the settlement of 1874 might be appointed trustees for all the purposes of the Settled Land Act of the settlement of the heirlooms created by the will and settlement, that the trustees of the will might be directed to pay the balance of the purchase-money of the picture to the trustees of the settlement, and that the latter might be directed to apply the money in discharge of incumbrances affecting the inheritance of the land settled by the deed of 1874. The summons was heard before Byrne J., who, on the ground that this was implied in the judgment of Buckley J., held that the settlement was a compound settlement; and he appointed the trustees of the will to be, for the purposes of the Settled Land Acts, trustees of the settlement of the heirlooms and of the proceeds of sale thereof created by the deed of 1874 and the will. The latter part of the summons stood over, and Lord Stafford proceeded to give a formal direction to the trustees of the compound settlement to apply 15,000*l.*, part of the proceeds of sale of the picture known as the Hebe heirloom, in the discharge of a mortgage debt of 15,000*l.* charged upon the fee simple and inheritance of the land settled by the deed of 1874.

The summons now came again before the Court on the question whether money arising in this way under the will could be applied for the benefit of the land subject to the settlement. It was opposed by the trustees of the compound settlement, the tenant for life in remainder, and by the infant tenant in tail, in whom (as she did not come within the proviso in the will with reference to the vesting of chattels in tenants in tail male by purchase) the heirlooms were vested subject to two life estates and to any possible estates which might come in and disappoint her estate.

The order of Byrne J. had not been drawn up, and it was adopted as his own by Warrington J.

Levett, K.C., and *Ingpen*, for Lord Stafford. The application of the proceeds of sale of the picture to the discharge of incumbrances on the settled land is a proper one, and we ask the Court to sanction it. Under a compound settlement money arising under one instrument forming part of that settlement can be applied for the benefit of land held under another instrument included in the settlement: *In re Duke of Marlborough's Settlement.* (1) It is said that that case can be distinguished on the ground that here the heirlooms are vested in the tenant in tail; but she is only presumptively entitled to them, and that is not a sufficient ground. It does not make any difference that in this case the heirlooms may become vested in a tenant in tail under the settlement of 1874, who in consequence of death in infancy, or death after attaining majority without barring the entail, may not become entitled to Costessey Hall in fee simple.

The question is how the proceeds of sale are to be invested. The effect of a compound settlement is the same as if the trusts were all included in one instrument. It is not necessary to invest the proceeds in the purchase of land: *In re Mackenzie's Trusts.* (2) The heirloom was sold by Lord Stafford under s. 37, sub-s. 1, of the Settled Land Act, 1882, and under sub-s. 2 the proceeds of sale are "capital money arising under this Act." They may, therefore, be applied under s. 21, clause (ii.), in the discharge of "incumbrances affecting the inheritance of the settled land." Money arising from one property can be applied in improvements on another property where both are devised by the same will: *In re Lord Stamford's Settled Estates* (3); and where both properties are comprised in a compound settlement: *In re Mundy's Settled Estates.* (4) In the present case the decision of Byrne J. was in terms only that there was a compound settlement of the heirlooms; but it is obvious that the land settled by the deed of 1874 is included in the compound settlement. There must be land included in the compound settlement or the Settled Land Act would not apply. It is immaterial that the trusts of the deed are not

(1) 30 Ch. D. 127; 32 Ch. D. 1.
(2) (1883) 23 Ch. D. 750.
(3) (1889) 43 Ch. D. 84.
(4) [1891] 1 Ch. 399.

WARRINGTON J.
1904
LORD STAFFORD'S SETTLEMENT AND WILL, *In re.*
GERARD *v.* STAFFORD.

precisely the same as those of the will: *In re Byng's Settled Estates* (1); *In re Lord Monson's Settled Estates* (2); *In re Mundy and Roper's Contract.* (3)

Norton, K.C., and *P. F. Stokes*, for the trustees of the will and of the compound settlement. We have to argue this case in the interests of possible unborn children, and we submit that there is no compound settlement of the land. It stands limited by way of succession within s. 2, sub-s. 1, under the deed of 1874 only. The fact that some other person has left heirlooms to devolve with the land does not make the will and the deed of 1874 a compound settlement of the land. On a sale of the land it would not be necessary to disclose the will. The trustees of the deed would receive the purchase-money. Therefore the land is not subject to the compound settlement, and this money cannot be applied for its benefit. Byrne J. has only held that the heirlooms are subject to the compound settlement. Proceeds of sale of heirlooms cannot be thus applied unless the land is settled by the same instrument: *In re Duke of Marlborough and Governors of Queen Anne's Bounty.* (4) A true compound settlement is where a tenant in tail of land under a settlement resettles it upon fresh trusts; then the two deeds together make the settlement. Sect. 37 is operative even if there is no land. Money has never been taken from one settlement and applied for the benefit of another unless the trusts have been identical. That was so in all the cases which have been cited. Here the trusts of the heirlooms and the land are not precisely the same. The tenant in tail is absolutely entitled to these heirlooms subject to the birth of other tenants in tail. So the Court is asked to give 15,000*l.* of her money to land which may never be hers. Further, the heirlooms are not subject to charges for jointures and portions, and it is proposed to spend the proceeds of sale on land which is so subject. We have offered to take a transfer of this mortgage, and ought not to be compelled to do more.

The Court has no longer jurisdiction to make this order. The money has already been invested in Consols under s. 22.

(1) [1892] 2 Ch. 219.
(2) [1898] 1 Ch. 427.
(3) [1899] 1 Ch. 275.
(4) [1897] 1 Ch. 712.

The tenant for life has no right to direct the trustees to vary an investment, although they may do so with his consent: sub-s. 4. There might be an application to the Court under s. 44 if there were a difference between the tenant for life and the trustees; but the Court would say that this proposal was unreasonable, and would refuse it.

Rowden, K.C., and *Ashton Cross*, for the infant tenant in tail. We adopt the arguments which have been advanced on behalf of the trustees. There is not in this case one settlement only; there are still to some extent two separate settlements. There is no fusion of the heirlooms and the land; but the heirlooms are treated as land, and constitute the "settled land" spoken of in the Act. There is no compound settlement of the land comprised in the deed of 1874, and it is not the settled land referred to in ss. 21 and 37. In *In re Duke of Marlborough's Settlement* (1) the tenant in tail was not liable to be cut out; he could disentail as soon as he attained twenty-one, so the incumbrances were on his own land; and the heirlooms were not vested in him: they would become his at the same time as the land. Therefore that case does not apply here. By s. 53 the tenant for life is a trustee for all parties entitled under the settlement. If he takes our money to pay off incumbrances on somebody else's land he commits a breach of trust, and the Court will restrain him from doing so: *Hampden* v. *Earl of Buckinghamshire*. (2)

Duka, for the next tenant for life.

Levett, K.C., in reply. The settled land referred to in the Act is the land settled by the deed of 1874 and the will, or by either of them. If this land is subject to the deed of 1874 only, and not to the compound settlement, the decision in *In re Mundy's Settled Estates* (3) must be wrong. All the cases shew that if there is a compound settlement it comprises all the land settled by the different documents composing it. [He was stopped on this point.]

No difficulty is caused by the fact that the proceeds of sale have been already invested in Consols. That investment was

(1) 30 Ch. D. 127; 32 Ch. D. 1. (2) [1893] 2 Ch. 531.
(3) [1891] 1 Ch. 399.

WARRINGTON J.

1904

LORD STAFFORD'S SETTLEMENT AND WILL, *In re.*

GERARD *v.* STAFFORD.

made by the trustees of the will before they were appointed trustees of the compound settlement. They had only been appointed to receive the proceeds of sale, and were acting merely for administrative purposes. Further, the Act does not say that a previous investment is to impose a fetter on the tenant for life.

It is not reasonable that these incumbrances should be kept on foot simply because the infant tenant in tail may some day be in possession of the land. Paying them off in this way will practically do her no harm.

WARRINGTON J. stated the facts, and continued:—In the first instance the matter came before Byrne J. upon an application for the appointment of trustees of what is described in the summons as the settlement of the heirlooms created by the will and settlement. That part of the application has been disposed of by Byrne J., and I must take it that the order now to be pronounced will contain a direction that three persons, who are in fact the trustees of Lord Stafford's will, "be appointed trustees of the compound settlement of the heirlooms and of the proceeds of sale of such of them as have been sold created by the above-mentioned settlement and will for all the purposes of the above-mentioned Acts." I proceed upon the basis of that order having been made. We start, therefore, with this. The heirlooms are settled so as to go with the settled land, and in appointing trustees the Court, for the purpose of that appointment, treats the settlement and the will as a compound settlement of the heirlooms. I quite agree the order does not propose to declare in terms that there is any compound settlement of the land.

Now I come to the Act of Parliament. Sect. 37, sub-s. 1, is this: "Where personal chattels are settled on trust so as to devolve with land until a tenant in tail by purchase is born or attains the age of twenty-one years, or so as otherwise to vest in some person becoming entitled to an estate of freehold of inheritance in the land, a tenant for life of the land may sell the chattels or any of them." Pausing there for a moment, that sub-section has nothing to do with the disposition of the

proceeds of sale; all that that sub-section provides is that the tenant for life of the land may sell the chattels. What is there meant by "the land"? It must be the land with which the chattels are to devolve, or in which, if any person becomes "entitled to an estate of freehold of inheritance," the chattels are to vest in that person. Applying that to the present case, the land there referred to must be the land settled by the settlement mentioned in Lord Stafford's will. The section goes on in sub-s. 2 to say: "The money arising by the sale shall be capital money arising under this Act, and shall be paid, invested, or applied and otherwise dealt with in like manner in all respects as by this Act directed with respect to other capital money arising under this Act, or may be invested in the purchase of other chattels, of the same or any other nature, which, when purchased, shall be settled and held on the same trusts, and shall devolve in the same manner as the chattels sold." And sub-s. 3: "A sale or purchase of chattels under this section shall not be made without an order of the Court." The money, therefore, arising by the sale of the chattels is to be capital money arising under the Act.

It is now necessary to turn to the definition clause in order to ascertain what is capital money arising under the Act. That is found in sub-s. 9 of s. 2: "Capital money arising under this Act, and receivable for the trusts and purposes of the settlement, is in this Act referred to as capital money arising under this Act." Now, the money arising by the sale of the chattels is "capital money arising under this Act," and therefore it is that which is referred to in the part of the Act which follows s. 2 by that expression. I now turn to s. 21, which is the section one must look at to find how any money which is "capital money arising under this Act" has to be applied. That provides: "Capital money arising under this Act, subject to payment of claims properly payable thereout, and to application thereof for any special authorized object for which the same was raised, shall, when received, be invested or otherwise applied wholly in one, or partly in one and partly in another or others, of the following modes." Clause (ii.) of s. 21 provides that it shall be applied in "discharge, purchase,

WARRINGTON J.
1904
LORD STAFFORD'S SETTLEMENT AND WILL, *In re.*
GERARD v. STAFFORD.

or redemption of incumbrances affecting the inheritance of the settled land, or other the whole estate the subject of the settlement, or of land tax, rent-charge in lieu of tithe, Crown rent, chief rent, or quit tent, charged on or payable out of the settled land." Therefore, inasmuch as this money is applicable in discharge of the incumbrance on the inheritance of the settled land, I have to find what is meant by "the settled land." If the land and the chattels were comprised in the same settlement—in the same document, that is—there would, I think, be no doubt, for the case is covered by authority. It was decided by Chitty J. in *In re Duke of Marlborough's Settlement* (1) that, as the land and the chattels were comprised in the same document, the proceeds of sale of the chattels might be applied in discharge of incumbrances on the land. And again, if the land and the chattels in this case had been the subject of the same document, the only possible distinction between *In re Duke of Marlborough's Settlement* (1) and the present would have arisen from the fact that the chattels in this case vest in an infant female tenant in tail at birth. It is said that *In re Duke of Marlborough's Settlement* (1) is distinguishable from the present, not only by the circumstance to which I have alluded, but also by the fact that the two items of property, the land and the chattels, are not in this case settled by the same instrument. But it seems to me that when you consider the wording of s. 21, clause (ii.) "the inheritance of the settled land," and compare that with s. 37, sub-s. 1, it is impossible to avoid the conclusion that the land referred to in s. 21, clause (ii.), as "the settled land" is the same as that which in s. 37 is referred to as the land with which the chattels devolve, or to an estate of freehold of inheritance in which the person in that section referred to is entitled. In my opinion, therefore, independently of the cases which have been decided on the question of compound settlements, I should have come to the conclusion on the construction of s. 37 and s. 21, clause (ii.), taken together, that the applicant was entitled, subject to certain minor points which I will refer to presently, to have the proceeds of the chattels

(1) 30 Ch. D. 127.

applied in discharge of the incumbrances affecting the inheritance of the land, by reference to the limitations of which the chattels are settled by the will.

But I think the case is made clear by the authorities that have been referred to. The strongest case, for the present purpose, is that of *In re Byng's Settled Estates.* (1) That case was a remarkable one, because the two documents there in question were what I may call independent documents. First, there was a will by which the estates were devised to certain uses in strict settlement; secondly, there was a deed by which a money fund was to be held by trustees on trust to lay it out in the purchase of land which was to be settled on limitations identical with those in the will, except that certain terms of years were imposed. There was no connection between the two documents except that the limitations in them were the same, putting out of consideration the terms with which I need not trouble. It was held that the will and the deed in that case constituted a compound settlement, so that the capital money arising under the deed, that is the second instrument (just as in the present case), could be applied in paying the cost of improvements executed upon land devised by the will. Now, just to try that with the provisions of the Act, the money there in question was capital money arising under the Act—that is to say, following the decision in another case, it was not necessary to invest the money in the purchase of land and then resell that land and turn it into money; but the money from the first was capital money arising under the Act. Primâ facie it was applicable for purposes to be found in or implied from the instrument settling the land from the sale of which it arose. Notwithstanding that, it was held that the capital money might be applied in the cost of improvements on the land devised by the will. That is not the same clause of s. 21 as I have now to consider, but I think for substantial purposes it is the same. The sub-section which was operative there was clause (iii.) of s. 21, which says that capital moneys may be applied "in payment for any improvements authorized by this Act." One must now go to s. 25, and there it is

(1) [1892] 2 Ch. 219.

WARRINGTON J.

1904

LORD STAFFORD'S SETTLEMENT AND WILL, *In re.* GERARD *v.* STAFFORD.

provided that—"Improvements authorized by this Act are the making or execution on, or in connection with, and for the benefit of settled land, of any of the following works." The same expression is used there as is used in s. 21, clause (ii.)—"settled land." I agree it is not "the settled land," but it is "settled land," and I cannot see, for the purposes of my present comparison, the difference between the two expressions—the one omitting the definite article and the other not omitting it. It was necessary to put in the definite article in the one case and not in the other. I think "settled land" must mean, primâ facie, the land settled by the instrument which settled the money or the land from which the money has arisen.

Notwithstanding that, it was held that, inasmuch as the two series of limitations were the same, the expression "settled land" in the improvement of which the money could be expended included the land settled by the first of the two instruments. North J. says this (1): "In my opinion, though there were differences between the limitations of the will and the deed in the present case, there is nothing to prevent my saying that the two instruments constituted one settlement for the purpose of the question which is now before me—namely, whether capital money arising under the deed can be applied in paying the cost of improvements executed upon land comprised in the will to which capital money arising under the will would clearly be applicable." In other words, he must have held—it must have been the basis of his judgment—that the will and the deed constituted a compound settlement, and a compound settlement as to each set of property; not merely a compound settlement in reference to the property comprised in the will the proceeds of which were then in question, but also a compound settlement in respect of the other land—that is to say, each piece of land was comprised in a settlement composed—for the purposes of the Settled Land Act—of the two documents.

Now, if that is so—and I can see nothing in any of the authorities that have been cited to-day to displace that view—it comes to this: that the matter is to be treated exactly as if

(1) [1892] 2 Ch. 228.

the land and the chattels had been settled by one document. I propose, therefore, to deal with the question on that footing. If that had been the case, if the two items of property had been settled by one document, then the case would have been covered by *In re Duke of Marlborough's Settlement* (1), subject only to the question arising from the distinction here as to the estate taken by the infant tenant in tail. In my opinion that distinction is not enough to exclude the authority of *In re Duke of Marlborough's Settlement.* (1) In every case in which the application of moneys arising from the sale of heirlooms for the benefit of the settled land is considered, there must be some distinction between the limitations—assuming it to be a strict settlement—inasmuch as the chattels will vest in a tenant in tail on attaining twenty-one without any further step on his or her part; whereas in the case of land he or she can only become entitled to the land by executing a disentailing deed. So that it is quite possible that different persons may become entitled to the proceeds of the chattels and to the estates themselves. But, notwithstanding that, it was held in *In re Duke of Marlborough's Settlement* (1) that the proceeds of the chattels were properly applicable in the discharge of incumbrances on the land.

It has been further contended that, even assuming that the money in question is applicable for this purpose, the tenant for life, who under s. 53 has to act as a trustee for all the persons interested under the settlement, is not fairly exercising the discretion given to him by directing the application of the money in the mode now in question. It is said that this is money to which, if the two tenants for life died at the present moment, this tenant in tail would be absolutely entitled, and that the present tenant for life is in fact taking the money of the infant tenant in tail to pay off incumbrances on land to which that infant may not become entitled. I think the answer to that was given by Chitty J. He says (2): "Then comes s. 53, on which it was argued that the tenant for life was a trustee of his power, and that it would be a breach of trust on his part to exercise this power so as in substance to

(1) 30 Ch. D. 127; 32 Ch. D. 1. (2) 30 Ch. D. 134.

WARRINGTON J.

1904

LORD STAFFORD'S SETTLEMENT AND WILL, *In re.*

GERARD *v.* STAFFORD.

defeat partially—because it is not wholly—the interest of the remainderman. The argument for the infant was really based upon this, that the tenant for life is not to have regard to the interest of all the parties interested under the settlement, looking at them as the head of the family would, but that he is to have regard to the peculiar interests of some particular person who takes in remainder. He ought to have regard, it was said, to the circumstance that if the money is thus applied the infant tenant in tail will, if he attains the age of twenty-one, become absolutely entitled, and, that being so, it would be inequitable and a breach of trust to prevent that absolute title from vesting. But it appears to me that the right view is that the tenant for life is to have regard to the interest of all parties. A good illustration of what was meant could be taken from a similar case to the present, which came before me in chambers." Then he gave an instance of a large landed estate which was in bad condition, but there were some valuable pictures which the tenant for life desired to sell for the purpose of improving the estate. He says (1): "It seems to me if he did that,"—that is, sold the pictures and applied the money under s. 25 to improving the estate—"that so far from it being fairly said that he disregarded, he would be really regarding the true interests of the persons entitled under the settlement." Now, allowing for the difference in the interest of the infant here and the interest of the person entitled in the case of *In re Duke of Marlborough's Settlement* (2)—and I may say that I have during the argument been very considerably impressed with that difference—making the utmost allowance for that, I do not think that I can say that the tenant for life is not entitled to regard as more important, in the interests of all the persons, including himself, who are now or may hereafter become entitled to the estate, the freeing of those estates from the incumbrance in question, rather than the keeping of this money invested or dealing with it in some other form. I do not think, therefore, I can say that this would be an improper application of the money in the sense that the tenant for life in doing this would not be duly exercising his discre-

(1) 30 Ch. D. 135. (2) 30 Ch. D. 127; 32 Ch. D. 1.

tion—the very wide discretion—which is given to him by the Settled Land Acts.

There is only one further point. It is said that the money in this case has been already applied under s. 21, clause (i.), and that there is no provision in the Act, when once that investment has been made, for any further application of the money by direction of the tenant for life, except where the trustees concur. I think that is answered by the last argument of Mr. Levett. The money here in question was not invested by "the trustees" in the technical sense. The pictures were sold before there were any trustees of the compound settlement, and the money was invested by the trustees of the will while they were trustees of the will, and before they had been appointed trustees of the settlement. It seems to me, therefore, that the fund representing the proceeds of sale of the chattels is now for the first time to be applied under s. 21, and that therefore that point does not arise.

I have not dealt with all the authorities that have been cited, because, although they were all very valuable in helping me to arrive at a decision, I think I have sufficiently expressed my view, without going in detail through the reasons that are given in those cases. The conclusion I come to is that s. 21, clause (ii.), applies to the present case; that "the land" referred to in that sub-section is in this case the land by reference to the limitations of which the heirlooms were settled; and that accordingly the applicant is entitled to have the 15,000*l.* applied in the manner proposed.

Solicitors: *Fooks, Chadwick, Arnold & Chadwick; Few & Co.; Slaughter & Colegrave.*

H. C. R.

WARRINGTON J.

1904

May 4, 5.

E. M. BOWDEN'S PATENTS SYNDICATE, LIMITED *v.* HERBERT SMITH & CO.

[1903 E. 750.]

Patent Action—Infringement—Practice—Parties—Title to Patent at date of Writ—Application for Patent—Assignment of Benefit of Protection—Equitable Assignee—Legal Owner not a Party—Amendment—Rules of Supreme Court, 1883, *Order* XVI., *r.* 11.

In June, 1897, B. applied for letters patent for an invention the subject of this action. By a deed of December, 1897, B. assigned to the plaintiffs all that the said invention and the benefit of the protection of the application of June, 1897. The patent was subsequently granted to B., and in accordance with the provisions of the Patents Act, 1883, s. 13, was dated back to June, 1897, the date of the application. In June, 1903, the writ in this action to restrain an alleged infringement of this patent was issued. B. was at this time entered in the register of patents as the owner. In October, 1903, B., in pursuance of the deed of December, 1897, assigned the said letters patent to the plaintiffs. B. had since died:—

Held, that the assignment of December, 1897, did not amount to an assignment of the letters patent, and consequently that the plaintiffs at the date of the commencement of this action were equitable assignees only of the patent, and were not entitled to maintain this action without bringing the legal owner of the patent before the Court. Leave was accordingly given to the plaintiffs to amend their writ and statement of claim by adding the executors of B. as plaintiffs on the terms of allowing the defendants to amend their statement of defence and particulars of objections; the costs of the day and any costs thrown away by reason of the necessity for making this amendment to be the defendants' costs in any event.

ACTION.

This was an action to restrain the infringement of the plaintiffs' patent, in which, on proceeding to prove the plaintiffs' title to the principal patent, the question was raised whether, under the circumstances hereinafter stated, the plaintiff company were, at the date of the issue of the writ, entitled to maintain this action without joining the registered owner of the patent as plaintiff or defendant. The facts and documents, so far as material for the purposes of this report, were as follows:—

On June 14, 1897, E. M. Bowden applied for letters patent for the invention in question.

By a deed of December 17, 1897, which contained recitals as to the grant of certain earlier letters patent, not material for the purposes of this report, and as to the application for the letters patent in question, which was in the stage of provisional protection, E. M. Bowden, as beneficial owner, assigned unto the plaintiff company "all that the said invention, and also all that and those the said letters patent and other protection described, mentioned, or referred to in the said schedule, and the sole and exclusive benefit thereof, and of all extensions and improvements thereof, and also all rights, powers, emoluments, and advantages whatsoever under or in respect of the said letters patent, and/or other premises or any part thereof . . . . To hold, use, exercise, and enjoy the said invention, letters patent, and premises unto and by the company, their successors and assigns absolutely." In the schedule was the following entry: "14th June, 1897, No. 14,402 of Great Britain, application for letters patent."

Letters patent were subsequently granted to E. M. Bowden, which, in accordance with the provisions of the Patents Act, 1883, s. 13, were dated June 14, 1897, the date of the application.

On July 2, 1903, the writ in this action was issued: at this time the only entry on the register of patents was the entry of E. M. Bowden as the owner of this patent, No. 14,402.

On October 13, 1903, a deed between E. M. Bowden of the one part and the plaintiff company of the other part was executed, by which, after reciting that E. M. Bowden was the inventor of "certain improvements in and relating to brakes for velocipedes and other road vehicles, and has obtained letters patent in respect thereof numbered 14,402, and dated 14th June, 1897, and also certain other letters patent"; and that "by virtue of an agreement dated the 17th day of December, 1897, made between the assignor of the one part and the company of the other part, the company is entitled to such inventions and letters patent, and has called upon the assignor to assign the same accordingly," E. M. Bowden as beneficial owner, in consideration of the premises, assigned unto the company "all those the hereinbefore recited inventions and

WARRINGTON J.
1904
E. M. BOWDEN'S PATENTS SYNDICATE, LIMITED v. HERBERT SMITH & Co.

the letters patent granted in respect thereof and the full benefit thereof, and all rights, powers, privileges, and emoluments connected therewith, including a right to apply for the extensions of the terms granted by the said letters patent respectively to hold the same unto the company absolutely."

The statement of claim contained an allegation that the plaintiff company were "the registered assignees of letters patent numbered 14,402 of 1897 granted to E. M. Bowden," and claimed an injunction to restrain infringement of this patent by the defendants with the usual consequential relief. The defence was a denial of infringement and a denial of the validity of the patent in question.

Since the commencement of the action Bowden had died.

T. Terrell, K.C., and *Lever* (*Moulton, K.C.*, with them), for the plaintiff company. The assignment of December, 1897, operated as an assignment of all the patentee's interest at that time, and of all rights accruing to him by virtue of the application of June, 1897, including the right to have the patent when granted dated back; the patent when granted passed to the plaintiff company by the assignment of the protection.

[WARRINGTON J. At the date of the writ the only person legally entitled to complain of any infringement was Bowden.]

Bowden had parted with all his interest in this patent to the plaintiff company, and had assigned all he could assign to the plaintiff company.

[WARRINGTON J. In the present state of things the defendant would not be protected by the judgment of this Court; a decision in favour of the defendant would not protect him against an action by the patentee.]

The objection is merely technical; we are prepared to join Bowden's executors by amendment if necessary, and ask for leave accordingly under the Rules of Supreme Court, Order XVI., r. 11.

[*Walter*, for defendant, referred to *Nobel's Explosives Co.* v. *Jones, Scott & Co.* (1) to shew that leave to amend ought not to be granted.]

(1) (1880) 42 L. T. 754.

On the facts we submit that the plaintiff company are the legal owners of this patent, and in a position to sue the defendant for infringement without joining the executors of Bowden. The fact that we were not on the register at the time is not material.

Walter and *Sinclair*, for the defendant. The assignment of December, 1897, has not been, and could not be, registered; the plaintiff was only an equitable assignee at the date of the writ, and an equitable assignee cannot sue in his own name; an exclusive licensee cannot sue without joining the patentee: *Heap* v. *Hartley* (1); the legal owner of the patent must be a party. On the documents in this case the plaintiff was not the legal owner of this patent when the action was commenced. If any amendment is allowed, it must be on terms that the defendant is allowed to amend the defence and particulars of objection, and has the costs occasioned by this delay.

T. Terrell, K.C., in reply. The plaintiffs in *Actien-Gesellschaft für Cartonnagen Industrie* v. *Temler* (2) were only equitable assignees. The date of the patent is prior to the date of the assignment, and the deed of December, 1897, is an assignment of all the rights of the patentee. As to the rights of an exclusive licensee, there appears to be no decision directly in point. [He also referred to *Renard* v. *Levinstein*. (3)]

WARRINGTON J. This question, I confess, has caused me some considerable embarrassment. [His Lordship, after calling particular attention to the allegation in the statement of claim that the plaintiffs were "the registered assignees" of the patent numbered 14,402, and having stated the facts and the material portions of the documents as above, continued:—]

In that state of circumstances, the question I have to determine is whether at the date of the issue of the writ in this action the plaintiffs were entitled to maintain this action against the defendants for infringement of this patent, No. 14,402, without making Mr. Bowden a party, either as plaintiff or defendant. In the first place, were the plaintiffs, E. M.

(1) (1888) 5 Rep. Pat. Cas. 603. (2) (1899) 16 Rep. Pat. Cas. 447.
(3) (1865) 2 H. & M. 628.

WARRINGTON J.
1904
E. M. Bowden's Patents Syndicate, Limited v. Herbert Smith & Co.

Bowden's Patents Syndicate, Limited, at the date of the issue of the writ legal assignees of this patent or not? If they were the legal assignees, then the question, which, judging from a passage which I see in Mr. Frost's book, is undecided, would arise, namely, whether they are entitled to sue before the registration. If they were not the legal assignees, that question does not arise.

The first question I have to decide, therefore, is, Were the syndicate at the date of the writ legal assignees of the patent? It has been contended by Mr. Terrell that they are, and the way in which he puts it is this. He says that the assignment was an assignment of the rights granted or acquired by the application for the patent; amongst those rights was a right to have the patent, when granted, dated back to a date anterior to the assignment, and that, when granted, the patent itself passed by the assignment of the protection. In my opinion that is not the true view of this deed. In my opinion, although the words of the assignment are, an assignment of "the protection," whatever that may mean, what the deed really amounts to is, an assignment of such beneficial rights as the fact of the protection, when perfected by the granting of the letters patent, may confer on the person who has made the application. I think it was really in law nothing more than an agreement to assign that patent to the assignee. I cannot satisfy myself, notwithstanding the ingenious way in which Mr. Terrell has put the case to me, that this amounts to an assignment of the patent, or that it would have been competent to the assignee to have it entered on the register as an assignment. I hold, therefore, that the plaintiffs, the Bowden's Patents Syndicate, Limited, at the date of the commencement of the action were the equitable assignees, and not legal assignees, of the patent.

Now that being so, are they entitled to sue for the protection of that of which they are the equitable assignees without joining the person in whom, upon the register, the patent is vested? No authority directly in point has been cited to me on either side. I confess I am rather surprised at this. I should have thought it would have been a point which would

have constantly arisen, and which ought to have been decided, so that there might be no further doubt about it; but no authority has been cited. One case has been referred to in which the plaintiffs were equitable assignees. I am alluding to the case of *Actien-Gesellschaft für Cartonnagen Industrie* v. *Temler* (1), before Stirling J. But as I understand that case, it was an application, to begin with, for an interlocutory injunction, and I can quite understand that in such a case as that, even if it had been necessary ultimately to amend the writ, it may have been that the learned judge would have entertained an application for an interlocutory injunction, because it very often happens that it is necessary to make an order at once, possibly without waiting for an amendment. But treating that case cited as an authority, it is enough for me to say there is no authority at all upon this point, because the point does not seem to have been raised or discussed. The decision of the learned judge was on a different point altogether. I think, therefore, I am right in saying that no authority on either side has been cited to me on this point.

Now what is the general rule of the Court with regard to an action brought by an equitable owner of property? The common case with which we are most familiar is an action relating to some debt in respect of which the provisions of the Judicature Act, which allow an assignee to bring an action in his own name without joining the assignor, have not been complied with. In that case, unless I am much mistaken, the well-accepted practice of this Court is that the legal owner of the property in question must be a party to the action, either as plaintiff or defendant. He is the proper person to bring the action. If he does not bring the action, then the course which the plaintiff adopts is that of proving that fact and making him a defendant. But the practice of the Court, as I understand it, is that the legal owner of the property must be before the Court somehow, in order that he may be bound. Applying that to the present case and holding, as I do, that that agreement of December, 1897, is not a legal but an equitable assignment of the patent, the conclusion I come to is that it is

(1) 16 Rep. Pat. Cas. 447.

WARRINGTON J.

1904

E. M. BOWDEN'S PATENTS SYNDICATE, LIMITED v. HERBERT SMITH & Co.

necessary in order to enable these parties to maintain this action to have the legal owner of the patent before the Court.

Now Mr. Bowden is dead, and I understand at present his will has not been proved. The present legal owners of the patent are the assignees under that deed of October, 1903; but the legal owners of the patent at the date of the issue of the writ would be either Mr. Bowden if he were alive, or his executors if he were dead. Therefore it would be necessary, in my opinion, to add the executors of Mr. Bowden as plaintiffs in the action. For that purpose it is obvious that the matter must stand over in order that they may be added.

I have been asked to allow the amendment, and I propose to do so; and the question now arises as to the terms on which that ought to be granted. I think I should be right in allowing the plaintiffs to amend their writ and statement of claim by adding the executors of Bowden as plaintiffs, by making the necessary allegations in the statement of claim, on terms of allowing the defendants to amend their statement of defence. I think with regard to the costs that the costs of yesterday and to-day, and any costs thrown away by reason of the necessity of making the amendment, ought to be the defendants' costs in any event.

Solicitors: *A. Withers; Phillips & Boyle.*

W. C. D.

RIDOUT *v.* FOWLER.

[1903 R. 927.]

C. A. 1904 June 16.

Vendor and Purchaser—Real Estate—Payment of Deposit—Purchaser's Interest in Land — Judgment Creditor of Purchaser — Equitable Execution — Appointment of Receiver—Notice to Vendor—Rescission of Contract by Consent — Payment by Vendor to Purchaser — Secured Creditor — Judgments Act, 1838 (1 & 2 *Vict. c.* 110), *s.* 13.

In June, 1901, the purchaser, under a contract for the sale of land (which was to be completed on September 29), paid a deposit and was let into possession. The purchaser did not complete at the time appointed, and litigation ensued between him and the vendor. In August, 1902, a judgment creditor of the purchaser obtained an order appointing himself, upon giving security, receiver of the rents, &c., receivable in respect of the purchaser's interest in the land under the contract for sale. Notice of this order was at once served on the vendor, and the order was registered under the Land Charges Registration and Searches Act, 1888, and the Land Charges Act, 1900, but the creditor did not perfect his security as receiver until May, 1903. Meanwhile, in January, 1903, the litigation between the purchaser and the vendor was compromised, a consent order being made for the rescission of the contract of sale and the delivery up of possession of the property by the purchaser on payment of 110*l.* to him by the vendor.

In May, 1903, the judgment creditor commenced an action against the vendor claiming a declaration that by virtue of the receivership order he was entitled to a lien or charge on the property for securing payment of the judgment debt and costs, with interest, and claiming also payment of the judgment debt and costs by the defendant:—

Held, that the 110*l.* was not paid to the purchaser as the price of any interest which he had in the land, but on the basis that he had no interest, and only for the purpose of getting him out of possession:

Held, therefore, that the judgment creditor had no claim against the vendor, and that the action must be dismissed.

Decision of Farwell J., [1904] 1 Ch. 658, affirmed.

APPEAL by the plaintiff from the decision of Farwell J. (1)

The facts are fully stated in the former report, and for the present purpose are sufficiently stated in the above head-note.

Bramwell Davis, *K.C.*, and *Talbot Crossfield*, for the plaintiff, repeated the arguments adduced in the Court below, referring to 1 & 2 Vict. c. 110, s. 13, and *Ex parte Evans*. (2)

(1) [1904] 1 Ch. 658. (2) (1879) 13 Ch. D. 252.

C. A. 1904 RIDOUT v. FOWLER.

They also cited *Rose* v. *Watson* (1) and *Whitbread & Co.* v. *Watt* (2) as shewing that the purchaser had a lien on the property for his deposit. There was no evidence of any default or negligence by which he had lost that lien, and the judgment creditor had by virtue of the receivership order a charge upon that interest: *Governors of Grey-Coat Hospital* v. *Westminster Improvement Commissioners.* (3)

W. F. Webster, for the defendant, was not called upon.

VAUGHAN WILLIAMS L.J. It has been said that the agreement under which the 110*l.* was paid to Green was "an act of oblivion." But we cannot shut our eyes to the real facts of the case. It was said that on proof of the existence of the contract for the purchase of the property, the payment of the deposit and the lapse of the time fixed for completion without the purchaser completing or offering to pay the balance of the purchase-money, he having paid the deposit would be entitled to judgment in an action for the return of the deposit, because the onus would be on the defendant to prove the reason for the non-completion of the contract. I cannot agree. I think that, wherever the onus originally was, on proof of the above facts there would be sufficient to throw upon the purchaser the onus of proving the cause of the non-completion. The plaintiff who has obtained this order for the appointment of a receiver and has registered it, says that he is entitled to have the 110*l.* which was paid to Green under the agreement between him and Fowler treated as the purchase-money of an interest which Green had in the land. I do not agree with that. I agree that, if the plaintiff had proved that Green had an interest in the land and that the 110*l.* was paid for that interest, the plaintiff would have been entitled to succeed in this action. But he has not proved that. So far from proving that the 110*l.* was paid as the price of an interest which Green had in the land, it is perfectly plain that the settlement took place on the basis that Green had no interest at all; that he was in default and had no right to the return of the deposit.

(1) (1864) 10 H. L. C. 672. (2) [1902] 1 Ch. 835.
(3) (1857) 1 De G. & J. 531.

The vendor desired to regain immediate possession of the property, and the 110*l.* was the price paid to get Green out of possession. In my opinion the appeal fails and should be dismissed with costs.

C. A. 1904 RIDOUT v. FOWLER.

ROMER L.J. I agree. The plaintiff has entirely failed to prove that the 110*l.* was paid by Fowler to Green in respect of any interest which he had in the property. On that short ground the appeal must fail.

COZENS-HARDY L.J. I agree.

Solicitors: *A. Pope; Smith, Fawdon & Low, for Bone, Bournemouth.*

W. L. C.

In re WRIGHTSON. BATTIE-WRIGHTSON *v.* THOMAS.

C. A. 1904 *March* 21, 22; *May* 17.

[1903 W. 1377.]

Will—Construction—Contingent Remainder or Executory Devise—Remoteness.

A testator devised freehold estates to uses in strict settlement.

By a codicil the testator directed that no devisee of any of his real estates devised under or by virtue of his will should have a vested interest therein or in any part thereof, or be entitled to the possession of the same or any part thereof, until the attainment of the age of twenty-four years, anything contained in his will or any law or usage to the contrary notwithstanding:—

Held, that the effect of the codicil was to make the limitations of the will executory devises, and consequently that they were void for remoteness and there was an intestacy.

Decision of Farwell J. affirmed.

In re Lechmere and Lloyd, (1881) 18 Ch. D. 524, *Miles* v. *Jarvis*, (1883) 24 Ch. D. 633, and *Dean* v. *Dean*, [1891] 3 Ch. 150, approved and followed.

Russel v. *Buchanan*, (1836) 7 Sim. 628; 2 Cr. & M. 561; 40 R. R. 193, distinguished.

APPEAL from a decision of Farwell J. upon the construction of the will and a codicil of William Battie-Wrightson.

The testator by his will dated July 28, 1854, devised considerable freehold estates to the use of his brother Arthur Bland Wrightson for life, with remainder to the use of his

C. A. 1904 WRIGHTSON, *In re.* BATTIE-WRIGHTSON *v.* THOMAS.

first and other sons successively according to seniority in tail male; with remainder to the use of the testator's brother Richard Heber Wrightson for life, with remainder to the use of his first and other sons successively according to seniority in tail male; with remainder to the use of the first and other sons of his brother Henry Wrightson successively according to seniority in tail male; with remainder to the use of the first and other sons of his brother Thomas Barnardiston Wrightson successively according to seniority in tail male; with remainder to the use of the first and every other son of Charles Edward Thomas and Georgiana Mary his wife successively according to seniority in tail male; with remainder to the use of the first and every other daughter of Charles Edward Thomas and Georgiana Mary his wife successively according to seniority in tail male, with an ultimate remainder to the use of Richard Heber Wrightson in fee. And the testator declared that "if any person whom I have hereby made tenant in tail male" of the estates or any part thereof "shall be born in my lifetime or in due time after my decease, then, and in every such case, the estate in tail or in tail male hereby limited to that person shall cease, and in lieu thereof I devise and appoint" the estates "to the use of the person respectively whose estate in tail male shall have so determined for the term of his or her life, and after his or her decease to the use of his or her first and every other son severally and successively according to seniority in tail male."

By a codicil dated December 14, 1868, the testator directed and declared "that no devisee or appointee of any of my real estates devised and appointed under or by virtue of my said will shall have a vested interest therein or in any part thereof or be entitled to the possession of the same or any part thereof until the attainment of the age of twenty-four years, anything contained in my said will or any law or usage to the contrary notwithstanding." In other respects the testator ratified and confirmed his will. The testator subsequently made eight other codicils, the last of which was dated May 16, 1878. None of those codicils altered the codicil of December 14, 1868. They made various alterations in the will immaterial for the

present purpose, and in other respects confirmed the will and prior codicils.

The testator died on February 10, 1879.

Arthur Bland Wrightson died before the testator unmarried.

On the death of the testator, Richard Heber Wrightson entered into possession of the estates as tenant for life under the will. He was in fact the testator's heir-at-law. He died on September 12, 1891, childless.

Henry Wrightson died on January 17, 1880, unmarried.

Thomas Barnardiston Wrightson died on December 27, 1860, unmarried.

William Henry Thomas, who assumed the name Battie-Wrightson, was the eldest son of Charles Edward Thomas. He was born on May 26, 1855. On the death of Richard Heber Wrightson he entered into possession of the estates as tenant for life under the will, and continued in possession until his death on April 28, 1903. He left surviving him a son, R. C. Battie-Wrightson, who was born on August 24, 1888.

The second son of Charles Edward Thomas was Charles Freeman Thomas, who was born on December 16, 1860.

Richard Heber Wrightson by his will devised his real estate to William Henry Thomas Battie-Wrightson, and he devised his real estate to his wife Lady Isabella Battie-Wrightson.

In May, 1903, a summons was taken out on behalf of R. C. Battie-Wrightson by a next friend, as plaintiff, against Charles Freeman Thomas, Lady Isabella Battie-Wrightson, the trustees of the will and codicils, and other persons, as defendants, for the determination of the construction of the will and the codicil of December 14, 1868.

Farwell J. made an order declaring that the limitations of the real estates under which the plaintiff claimed failed upon the death of W. H. Battie-Wrightson as being executory devises void for remoteness, and that the real estates passed to the heir-at-law of the testator.

The defendant Charles Freeman Thomas appealed.

Warmington, K.C., *Upjohn, K.C.*, and *W. H. Cozens-Hardy*, for the appellant. It is submitted that the codicil does not

C. A. 1904 WRIGHTSON, *In re.* BATTIE-WRIGHTSON *v.* THOMAS.

turn the limitations into executory devises, but has the effect of making them contingent remainders, the contingency being the attainment of twenty-four. On the death, therefore, of William Henry Battie-Wrightson, leaving no son who had attained twenty-four, the estates passed to the appellant, who is the second son of Charles Edward Thomas, and had then attained twenty-four.

The rule is well settled that a limitation must take effect as a remainder if it can possibly do so: Fearne on Contingent Remainders, 10th ed. vol. i. pp. 386, 395; *Hopkins* v. *Hopkins* (1); *Doe* v. *Morgan*. (2)

Farwell J. has held that the joint effect of the will and codicil is that future interests are given without a preceding freehold estate to support them. It is submitted that that is not the true effect of the will and codicil, but that the operation of the codicil is not to alter the limitations in the will further than to add a contingency, namely, the contingency of attaining twenty-four. The codicil does not make any new testamentary disposition; it only introduces a contingency.

Farwell J. would have decided in favour of the appellant but for the words in the codicil "be entitled to the possession," and the learned judge based his decision on the doctrine laid down by Jessel M.R. in *In re Lechmere and Lloyd* (3), that in order to constitute an executory devise there must be a clear gift to persons who could not possibly take by way of remainder. The learned judge held that that was the effect of the codicil in the present case, and it is contended that he was wrong in so holding. It is submitted that the effect of the codicil was not to make a gift, but only to impose a restriction on the gift made by the will. *In re Lechmere and Lloyd* (3), therefore, does not apply, for the codicil operates only to exclude persons who would have taken under the will, and does not introduce a new class of devisees. For the same reason *Miles* v. *Jarvis* (4) and *Dean* v. *Dean* (5) are distinguishable from the present case. In *Symes* v. *Symes* (6) somewhat similar limita-

(1) (1738) 1 Atk. 581.
(2) (1790) 3 T. R. 763.
(3) 18 Ch. D. 524.
(4) 24 Ch. D. 633.
(5) [1891] 3 Ch. 150.
(6) [1896] 1 Ch. 272.

tions were construed as remainders. And in *In re Lechmere and Lloyd* (1) Jessel M.R. said that in the case of a devise to A. for life, and after her death to a class of children who should attain twenty-one, those members of the class who had not attained twenty-one at the death of the tenant for life could not take. The argument that "vest" means "indefeasibly vest" is answered by the codicil. When you are dealing with legal limitations it is not sufficient to rely on an ambiguous expression in a codicil.

There are three rules which shew that the appellant is in the right: (1.) If possible a limitation should be construed as a contingent remainder rather than as an executory limitation. (2.) When a distinct disposition is made by a will it cannot be revoked by a codicil except by equally clear and distinct words. (3.) Although for the purpose of construing a document the Court will not have regard to the rule against perpetuities, yet if the document is ambiguous the rule will weigh with the Court: *Pearks* v. *Moseley*. (2) A decision against the appellant will certainly defeat the intention of the testator.

As to the second rule, see *Kellett* v. *Kellett*. (3)

[COZENS-HARDY L.J. referred to *Randfield* v. *Randfield*. (4)

VAUGHAN WILLIAMS L.J. referred to *Doe* v. *Hicks*. (5)]

As to rule 1: *Purefoy* v. *Rogers* (6); *Doe* v. *Morgan* (7); *Cole* v. *Sewell*. (8) Here the will contains a plain limitation of a particular estate of freehold with a number of limitations in remainder, and there is a limitation to trustees on trust to preserve contingent remainders. The codicil contains no limitation; it is not affirmative, but purely negative. Some persons who would take under the will are to be prevented from doing so unless they answer to a further description—namely, attain twenty-four. The codicil has to be applied on the termination of the particular estate, and then the question has to be asked, Has the person who would take under the

(1) 18 Ch. D. 528.
(2) (1880) 5 App. Cas. 714, 719.
(3) (1868) L. R. 3 H. L. 160, 167.
(4) (1860) 8 H. L. C. 225.
(5) (1831) 1 Cl. & F. 20, 24, 25; 36 R. R. 1.
(6) (1671) 2 Saund. (6th ed.) 380, 388.
(7) 3 T. R. 763, 765.
(8) (1843) 4 D. & War. 1, 26; 65 R. R. 668.

C. A. 1904 WRIGHTSON, *In re.* BATTIE-WRIGHTSON *v.* THOMAS.

will attained twenty-four? If he has not, he is to be struck out of the limitations, and the next in remainder who has attained twenty-four comes in. This is the literal meaning of the words, and it preserves the scheme of the will. The other construction would destroy the limitations of the will entirely, except the first tenancy for life.

[VAUGHAN WILLIAMS L.J. Are the words "shall not be entitled to possession" surplusage?]

The meaning would have been the same without those words, but they are emphatic and make the meaning clear. A contingent remainder must vest in possession on the termination of the particular estate or during its continuance. There is no difficulty in applying the codicil to the limitations of the will. The result of the other construction would be to defeat every limitation in the will subsequent to the first life estate to the brother Richard Heber.

In the cases on which Farwell J. relied the limitation was to those members of a class who either before or after the death of the tenant for life should attain twenty-one. The words are different here, and it would not be reasonable to insert words in the codicil for the purpose of converting all the limitations of the will into executory devises and so rendering them void. The Contingent Remainders Act, 1877 (40 & 41 Vict. c. 33), does not apply to this will and codicil, which were executed before the passing of that Act.

In *Dean* v. *Dean* (1) Chitty J. said: "A difference in the mere form of words does in several cases make a difference in law." In the present case it is not in terms said that a person attaining twenty-four after the death of the tenant for life is to take, and the Court is invited to insert in the codicil words which are not there for the express purpose of destroying the limitations in the will. It is submitted that there will be nothing inconsistent with the words in treating the limitations as contingent remainders.

Levett, K.C., and *P. S. Stokes*, for the plaintiff, the infant tenant in tail. The question relates to purely legal estates. The rules 1 and 3 which have been mentioned must, of course,

(1) [1891] 3 Ch. 150, 155.

be accepted. But it is submitted that the infant took a clear vested estate tail under the will, and there is no equally clear revocation of that estate by the codicil. It is not cut down. The word "vested" means "indefeasibly vested." The remainders to unborn children became vested on birth: *Doe* v. *Hicks*. (1) The scheme of the will was seniority, and the codicil was not intended to alter that scheme, and to make the vesting depend on the accident which of the testator's brothers should happen to have a son aged twenty-four living at the time when the particular estate should determine. The will provides for seniority even as between daughters. The codicil is inconsistent with the creation of an estate which was not to vest until twenty-four, but it is consistent with an estate tail vested at birth. There are no words of gift in the codicil, but there are no words of revocation. There are no words which give an estate tail contingently on attaining twenty-four. The codicil should be read as if it were inserted in the will. Then the rule will apply that a condition should if possible be construed as subsequent rather than precedent: Hawkins on Wills, p. 237; *Duffield* v. *Duffield*. (2) In that way the sequence of the limitations in the will will not be altered: *Edwards* v. *Hammond* (3); *Randoll* v. *Doe* (4); *Phipps* v. *Ackers* (5); *Berkeley* v. *Swinburne* (6); *Taylor* v. *Frobisher*. (7) The testator has merely endeavoured to prolong the period of minority.

Jenkins, K.C., and *George Lawrence*, for the devisee of the testator's heir-at-law. It is contended that the learned judge was right in holding that there is an intestacy. The effect of the codicil is to convert the limitations of the will into executory devises, and they are too remote. No doubt the rule is that a limitation must take effect as a contingent remainder, if it can possibly do so. But the question is one of construction

(1) 1 Cl. & F. 20; 36 R. R. 1.
(2) (1829) 3 Bli. (N.S.) 260; 1 Dow & Cl. 268, 311; 32 R. R. 70.
(3) (1683) 1 Bos. & P. (N.R.) 324, n.; 8 R. R. 815, n.
(4) (1817) 5 Dow, 202; 14 R. R. 448.
(5) (1835) 3 Cl. & F. 702; 39 R. R. 115.
(6) (1848) 16 Sim. 275.
(7) (1852) 5 De G. & Sm. 191, 197.

C. A. 1904 WRIGHTSON, *In re.* BATTIE-WRIGHTSON *v.* THOMAS.

of the particular instrument: *In re Lechmere and Lloyd.* (1) The present case is not exactly covered by authority; the words are not the same as those in *In re Lechmere and Lloyd.* (1) The real question is, Are the words of the codicil sufficient to shew that the testator intended that a child of a tenant for life should take though his father had died under twenty-four? Under the will the remainders might be vested either in possession or not in possession. A remainderman could not be entitled to possession until all the particular estates before him had disappeared. Then the codicil says that the person who under the will would be entitled to possession is not to have possession until he attains twenty-four. It is impossible, therefore, that the limitation can be a remainder; it must be an executory devise, and it is too remote. The attainment of twenty-four might be after the determination of the particular estate.

Again, the rule is that any limitation which comes after a limitation which fails because it is bad is also itself bad. This will was republished by the last codicil after the Contingent Remainders Act, 1877, came into operation. The remainder became bad in the result, not in its creation. Perpetuity was an exception to the general rule that a remainder would always take effect. If the remainders were contingent they would fail by reason of the perpetuity. The issue are there to take, but they cannot take by reason of the remoteness: *Monypenny* v. *Dering.* (2) Here the gifts over are on the termination of estates tail. If you only get the previous limitations out of the way by reason of the rule against perpetuities, the conditional limitation does not take effect. The testator did not intend that the person who stands in the third place should take when the second is there to take, but is only prevented from doing so by the rule against perpetuities. The words of the codicil are too strong to enable the Court to get out of them. The words "vesting" and "possession" are contrasted. The testator says that persons who take a vested interest under the will are not to acquire a vested interest in possession until

(1) 18 Ch. D. 524. (2) (1852) 2 D. M. & G. 145, 180.

twenty-four. No words could be plainer, and the learned judge was right in saying that he could not get over them.

Butcher, K.C., and *F. L. Wright*, for the trustees.

Maugham, for the other parties.

Warmington, K.C., in reply. It is submitted that the codicil imposes a new condition or contingency—the attainment of twenty-four: *Russel* v. *Buchanan*. (1) That case is exactly in point. The cases cited for the infant are easily distinguishable. Some of them related to personal estate.

Randoll v. *Doe* (2) was no doubt a case of real estate, but there the attainment of twenty-one was mentioned in the gift itself. But that does not apply to a gift followed by a proviso that the donee shall not take until he attains twenty-four.

Cur. adv. vult.

May 17. STIRLING L.J. read a judgment in which, after stating the facts as above, he continued:—One of the questions raised in this action is as to the effect of the codicil on the limitations contained in the testator's will. It was held by Farwell J. that, regard being had to the terms of the codicil, the limitations of the will took effect by way of executory devise and had failed for remoteness. From this decision an appeal has been brought, on the hearing of which two contentions were raised—first, that the limitations ought to take effect as vested remainders, liable to be divested in the event of the death of the devisee under twenty-four years of age; secondly, that the limitations ought to be held to take effect as contingent remainders.

As to the first contention, the law is thus stated by Best C.J. in *Duffield* v. *Duffield* (3): "It has long been an established rule for the guidance of the Courts of Westminster in construing devises, that all estates are to be holden to be vested, except estates in the devise of which a condition precedent to the vesting is so clearly expressed that the Courts cannot treat them as vested, without deciding in direct opposition to the

(1) 7 Sim. 628; 2 Cr. & M. 561; 40 R. R. 193.

(2) 5 Dow, 202; 14 R. R. 448.

(3) 3 Bli. (N.S.) 260, 331; 1 Dow & Cl. 268, 311; 32 R. R. 70.

C. A. 1904 WRIGHTSON, *In re.* BATTIE-WRIGHTSON *v.* THOMAS. Stirling L.J.

terms of the will. If there be the least doubt, advantage is to be taken of the circumstance occasioning that doubt; and what seems to make a condition is holden to have only the effect of postponing the right of possession."

In the present case it seems to me that the codicil expresses so clearly that the attainment of the age of twenty-four years is a condition precedent to the vesting, that the Court cannot treat the limitations in the will as creating vested remainders without deciding in direct opposition to the terms of the codicil, which directs, not merely that no devisee is to have a vested interest in the estates until the attainment of the age of twenty-four years, but also that until that event the devisee must not be entitled to possession—a right to which a vested remainder, even if liable to be divested, would confer on the devisee upon the determination of the prior estates.

As to the second contention, it is no doubt well settled that if a limitation can take effect as a contingent remainder it cannot operate as an executory devise. It is, however, laid down by Mr. Fearne (Contingent Remainders, 10th ed. vol. i. pp. 398–9): "That, notwithstanding the will may give a preceding estate of freehold, capable in its own nature of supporting a contingent remainder; yet, if an ulterior limitation wants that connection with, or relation to it, which is requisite to constitute it a remainder, it may take effect as an executory devise, if confined to the limits prescribed by law for estates of that future description." It has according been held that when it appears that the ulterior limitation is not intended to commence in all circumstances immediately on the expiration of the particular estate it is incapable of taking effect as a remainder and may operate as an executory devise: *In re Lechmere and Lloyd* (1); *Dean* v. *Dean* (2); *Symes* v. *Symes*. (3)

The question, therefore, is reduced to this: whether on the fair construction of the codicil the testator intended that the devises referred to in the codicil should in all cases take effect on the determination of the prior limitations. I think not. The limitations in the will are legal vested remainders. The

(1) 18 Ch. D. 524. (2) [1891] 3 Ch. 150.
(3) [1896] 1 Ch. 272.

meaning of the codicil appears to me to be that on the determination of any prior limitation in the will the succeeding limitation shall not come into operation by way of entitling the devisee to possession unless and until the devisee attains the age of twenty-four years, but that if he should attain that age then he should enter into actual enjoyment of the estate intended for him. If, for example, an elder brother of the testator died leaving a son under twenty-four, I do not think the meaning was that he and the younger sons of that brother should be deprived of the estates and that they should pass to a son who had attained twenty-four of a younger brother of the testator, but that the limitation in favour of a son under twenty-four should not take effect in interest or in possession unless and until he attained twenty-four. Effect can be given to such a disposition only by way of executory devise. The case of *Russel* v. *Buchanan* (1) does not conflict with this decision, the language of the testator in the will there dealt with differing materially from that which is found in the codicil which gives rise to the present litigation.

In my opinion, therefore, the decision of Farwell J. was right and the appeal fails.

COZENS-HARDY L.J. This is an appeal from a judgment of Farwell J., who has held that the limitations of the testator's real estates under which the plaintiff claims failed upon the death of William Henry Battie-Wrightson as being executory devises void for remoteness, and that the real estates accordingly passed to the testator's heir-at-law.

Under the will, dated in 1854, there are a series of limitations in strict settlement under which, on the death without issue in 1891 of Richard Heber Wrightson, the said William Henry Battie-Wrightson, who died in 1903, became tenant for life in possession, with remainder to the plaintiff, his eldest son, an infant, as tenant in tail male, with divers remainders over, including a remainder to Charles Freeman Thomas, the plaintiff's uncle, who was born in 1860, for life, with remainders over. There is no question of construction on the limitations

(1) 7 Sim. 628; 2 Cr. & M. 561; 40 R. R. 193.

C. A. 1904 WRIGHTSON, *In re.* BATTIE-WRIGHTSON *v.* THOMAS. Cozens-Hardy L.J.

of this skilfully drawn will. But the testator made a codicil in 1868 which creates all the trouble. [His Lordship read the codicil.] The question which arises for our consideration is, what is the effect of the will and codicil taken together, and for this purpose the rule against perpetuities or the doctrine of remoteness must be put aside.

On the part of the plaintiff it is urged that there is nothing in the codicil sufficiently explicit to cut down the clear vested estate tail created by the will, and that the words referring to a "vested interest" only mean that the plaintiff's interest is not to be absolute and indefeasible until he attains twenty-four, or, in other words, that his estate tail is liable to be defeated by a condition subsequent in the event of death under twenty-four. This view might perhaps have been taken had not there been the subsequent words which direct that the plaintiff is neither to have a vested interest nor to be "entitled to the possession." Under those circumstances I feel driven to give to the words a "vested interest" their proper technical meaning. It is further urged on the part of the plaintiff that the codicil is void for uncertainty, or, at least, is so difficult to construe, and so inconsistent with the general scheme of the will, that it ought to be disregarded. This argument has tempted me, but I cannot see my way to adopt it. I hold, therefore, that the plaintiff cannot succeed under the limitations of the will, because he was not twenty-four at his father's death, or under the codicil, assuming it is to operate by way of executory devise, because of remoteness.

On the part of the defendant Charles Freeman Thomas it is urged that the effect of the codicil was simply to make the remainders under the will contingent remainders, and that, as the plaintiff was not twenty-four when the particular estate of his father determined, the plaintiff's contingent remainder failed, and that the estate of the defendant Charles Freeman Thomas was the first estate ready to arise and take effect in remainder at the moment of the determination of the particular estate. The general and well-established rule, that when limitations can take effect as remainders they are not to be treated as executory devises, is strongly relied upon. And,

while admitting that recent authorities have held that this rule is not absolute and may yield to words clearly indicating an intention to the contrary, it is argued that no such words are to be found in the present case, and that mere negative words ought not to be regarded as equivalent to positive words of disposition.

But on the part of the heir-at-law it is urged that the codicil shews a plain intention to dispose of the property in a manner inconsistent with contingent remainders, and necessarily involving the creation of executory devises. The codicil deals with every kind of estate, with life estates as well as with estates tail, and with estates in possession as well as with estates in remainder. It says, in effect, that the plaintiff, whose father is dead, shall not be entitled to possession until he attains twenty-four—a provision which is inconsistent with the idea of a legal remainder, which must take effect on the father's death. The codicil contemplates a possible gap between the death of the tenant for life and the attainment of twenty-four, and that involves a disposition taking effect by way of executory devise and not by way of contingent remainder. In support of this contention, the decisions of Sir G. Jessel in *In re Lechmere and Lloyd* (1), of Kay J. in *Miles* v. *Jarvis* (2), and of Chitty J. in *Dean* v. *Dean* (3) are relied upon as having relaxed the stringency of the old rule.

Farwell J. has adopted this view, and decided in favour of the heir-at-law. I do not see my way to differ.

VAUGHAN WILLIAMS L.J. concurred.

Solicitors: *Pennington & Son; Foyer & Co.; Tyrrell Lewis, Lewis & Broadbent.*

(1) 18 Ch. D. 524. (2) 24 Ch. D. 633.
(3) [1891] 3 Ch. 150.

W. L. C.

C. A.
1904
BUCKLEY J.
May 6.
C. A.
May 12, 20.

MOSELY *v.* KOFFYFONTEIN MINES, LIMITED.

[1904 M. 1142.]

Company—Shares—Issue of Shares at a Discount—Issue of Debentures at a Discount—Option to Debenture-holders to take fully paid Shares in Exchange for Debentures.

A company proposed to issue to its shareholders debentures at a discount of 20 per cent., repayable on November 1, 1909, upon the terms of a circular whereby the registered holder was to have the right at any time prior to May 1, 1909, to exchange his debentures for fully paid shares in the company at the rate of one 1*l.* fully paid share for every 1*l.* of the nominal amount of the debentures; and by the conditions of the debentures, in the event of the debenture-holder giving to the company a written demand for shares in exercise of this right, the principal moneys were to become immediately repayable:—

Held (reversing the decision of Buckley J.), that the proposed issue of debentures was void, inasmuch as it was capable of being used as a means of issuing shares at a discount.

Observations of Vaughan Williams L.J. as to paying for shares otherwise than in cash.

MOTION.

The defendant company was incorporated on May 19, 1893, under the Companies Acts, 1862 to 1890, for the purpose of acquiring certain mines known as the Koffyfontein Mines. The original capital of the company was 125,200*l.*, divided into 125,000*l.* ordinary shares of 1*l.* each and two shares of 100*l.* each known as life governor's shares, and the capital had since been largely increased.

The plaintiff was the largest shareholder in the company.

The company proposed to issue 85,000*l.* 5 per cent. first mortgage debentures upon the terms of a circular issued to the shareholders on April 25, 1904. These debentures were to be issued at 80 per cent. in denominations of 10*l.*, 25*l.*, 50*l.*, and 100*l.* They were to be secured by a specific first mortgage on the company's farm and buildings, and a general charge upon the remainder of the company's assets except its mining claims, and they were to be repayable on November 1, 1909. Clause D of the circular was as follows: "Debenture-holders will have

the right at any time prior to May 1, 1909, to exchange their debentures for fully paid shares in the company at the rate of one 1*l.* fully paid share for every 1*l.* of the nominal amount of the debentures." By the proposed form of debenture the principal moneys secured by the debenture were to be repaid on November 1, 1909, or on such earlier date as the same might become payable in accordance with the conditions indorsed thereon. Condition 8 made these principal moneys immediately payable;—(*b*) in the event of the registered holder giving to the company a direction in writing under condition 10. Condition 10 was as follows: "The registered holder hereof may at any time prior to the 1st day of May, 1909, direct the company, in writing addressed to it at its registered office for the time being, to allot and issue to him in exchange for and in satisfaction of this debenture fully paid shares of the company [*sic*] capital of the company, at the rate of one share of 1*l.* for every 1*l.* of the nominal amount of the debenture, and the company shall after the surrender of this debenture comply with such direction."

The plaintiff, on behalf of himself and all other shareholders of the company except the defendants, moved for an injunction to restrain the company and its directors until the trial of the action from carrying into effect the proposed allotment of debentures pursuant to the scheme set forth in the circular of April 25, and from proceeding with the issue of any debentures pursuant thereto, and from issuing any debentures under the said scheme, or any other debentures pursuant to any similar scheme. The ground of the application was that the transaction involved the issuing of shares at a discount.

The motion was heard before Buckley J. on May 6, 1904.

Buckmaster, K.C., and *H. Greenwood*, for the plaintiff.

Neville, K.C., *Astbury, K.C.*, and *J. W. M. Holmes*, for the defendants.

BUCKLEY J. An action is here brought by one shareholder, suing on behalf of himself and all others, to restrain the company and its directors from carrying out a particular issue of

C. A. 1904 MOSELY v. KOFFYFONTEIN MINES, LIMITED. Buckley J.

debentures which is contemplated, and the terms of which are stated in a circular dated April 25, 1904. There is no question about the powers of the directors; the question is whether the bargain which they propose to make is ultra vires because it involves an issue of shares at a discount. The whole question turns on Clause D of the terms of issue.

Now, in the first place, it seems to me that this scheme is not a colourable device for the purpose of the issue of the shares at a discount. If it were so, I should regard it from a very different point of view. The facts as regards the value of the shares are these. Their present market price is about three-eighths or one-half, but Mr. Mosely, the plaintiff, says, and I will take it that it is so, that it is to a large extent a nominal price; that the purchase of a few shares or the sale of a few shares would send the price very much up or very much down, and that although, say, three-eighths is the price to-day, it may be very much altered to-morrow. I also take into account that, after the plaintiff has made investigation into various matters, it is likely that he may be able to carry through a proposal to issue a considerable number of further shares at par. Taking all those facts into consideration, it seems to me that the transaction here proposed is not colourable in the sense that it is a mere device under which the company is going to take 80*l.* with the intention or expectation or reasonable probability that the holders of the debentures issued for that 80*l.* will come to-morrow or the next week, or within the next six months, and say, "Give us 100*l.* worth of shares." I am quite satisfied that that is not, in the state of facts, a thing that was ever contemplated or likely to happen. This transaction is not colourable. I have to look to see what the nature of it is. Now the nature of it is that the company is to receive 80*l.*, and for that is to issue debentures for 100*l.*, and those are to be redeemable at par in November, 1909; so that the company comes under a liability to pay at a subsequent date 100*l.* Clause D, the clause in question, is this: "Debenture-holders will have the right at any time prior to May 1, 1909, to exchange their debentures for fully paid shares in the company at the rate of one 1*l.* fully paid

share for every 1*l.* of the nominal amount of the debentures." Now if any person, having taken his debentures, exercises that right to-day he will only get three-eighths or one-half—50*l.* or something less than 50*l.* worth of shares for his 80*l.* Of course he will not do that if he is a wise man; it is not likely that he will. The scheme, therefore, is not illusory. Then what does he get, having regard to Clause D? It seems to me that the matter may be regarded in either one of two ways. The debenture-holder either obtains for 80*l.* a debt of 100*l.* payable in 1909, or, in an event, at an earlier date, in which case he is to invest the money in shares; or he becomes entitled to a 5 per cent. investment constituting property which he is to be entitled to exchange for 100*l.* worth of shares in the company. If it be the first case, and be not illusory, but a real bargain, then at the anticipated date of repayment 100*l.* will become due to him—honestly and really become due to him—because there has been reserved to him the right to ask for his 100*l.* earlier, if he is minded to invest it in a particular way. Taking that 100*l.*, he would buy 100*l.* worth of shares with it, and there would be no issue of shares at a discount. If the other be the true view—and I rather think it is the better view—if what he holds is an obligation of the company to pay at a postponed time, which obligation he is entitled to exchange for 100*l.* worth of fully paid shares in the company, then those shares are not going to be paid for in cash at all; they are going to be paid for in property. As regards that, the decisions in *Ooregum Gold Mining Company of India* v. *Roper* (1) and in *In re Wragg, Ld.* (2) have established this—that it is competent for a company to issue shares for property which the company agree to take as of a value fixed by themselves irrespective of what may be the actual or intrinsic or real value of the property. As to that, Lord Watson in *Ooregum Gold Mining Company of India* v. *Roper* (3), says: "It has been decided that, under the Act of 1862, shares may be lawfully issued as fully paid up, for considerations which the company has agreed to accept as representing in

(1) [1892] A. C. 125. (2) [1897] 1 Ch. 796.
(3) [1892] A. C. 136.

C. A. 1904 MOSELY v. KOFFYFONTEIN MINES, LIMITED. Buckley J

money's worth the nominal value of the shares. I do not think any other decision could have been given in the case of a genuine transaction of that nature where the consideration was the substantial equivalent of full payment of the shares in cash. The possible objection to such an arrangement is that the company may over-estimate the value of the consideration, and, therefore, receive less than nominal value for its shares. The Court would doubtless refuse effect to a colourable transaction, entered into for the purpose or with the obvious result of enabling the company to issue its shares at a discount; but it has been ruled that, so long as the company honestly regards the consideration given as fairly representing the nominal value of the shares in cash, its estimate ought not to be critically examined." Then he goes on to point out that the rule is calculated to induce companies to pay extravagant prices for goods to persons who are willing to take payment in shares, and he says (1): "The rule is capable of being abused, and I have little doubt that it has been liberally construed in practice." Speaking for myself, I am exceedingly conscious of the danger there is, having regard to the doctrine established by these cases, that a door may be opened for shares to be issued at less than their nominal value at a discount. The law, however, is established that if the transaction be not colourable, a transaction of issuing shares for property fairly taken by the company as being equivalent to the nominal value of the shares is good. Now, it seems to me here that if Clause D is read in the second sense the property for which the exchange is to be made is within that principle. It follows from this that the transaction is not within the rule prohibiting the issue of shares at a discount. I must therefore refuse to make an order.

H. C. R.

C. A. The plaintiff appealed.

The appeal was heard on May 12, 1904.

Buckmaster, K.C., and *H. Greenwood*, for the plaintiff. This is a scheme which may bind the company to do some-

(1) [1892] A. C. 137.

thing which it has no power to do, namely, issue shares at a discount, and it is therefore bad. Under this scheme the debenture-holder is entitled to exchange his debentures for shares at any time; he is not bound to wait until the real time of payment; and the effect of the scheme is to enable him to obtain a 100*l.* worth of shares for 80*l.* If the company purchases goods or services which do not permit of an obvious money measure being made, and it chooses to fix the value itself, then, in the absence of fraud, it may issue shares up to that value; but in this case the contract itself shews that the value of the property in exchange for which the shares are to be given is less than the nominal value of the shares: *Ooregum Gold Mining Company of India* v. *Roper* (1); *Chapman's Case* (2); *Welton* v. *Saffery* (3); *In re Wragg, Ld.* (4); *In re Almada and Tirito Co.* (5)

Neville, K.C., and *Astbury, K.C.* (*J. W. M. Holmes* with them), for the defendants. The plaintiff's real objection to the scheme is that the defendants are issuing debentures at a discount—a transaction which is perfectly lawful. This transaction may be supported on either of the grounds stated by the learned judge. The sounder view is that this is a debenture for 100*l.*, payable at a particular date, but immediately payable if the debenture-holder chooses to take shares in payment. The consideration for the shares is 100*l.*, payable by the company, and it matters not what was paid for the debenture. This scheme, therefore, does not involve the issue of shares at a discount. The alternative view is to regard the debenture as an investment, and the giving of shares for property other than shares does not come within the rule against issuing shares at a discount so long as the consideration is not illusory. If this were a colourable device for issuing 100 1*l.* shares for 80*l.* under the guise of issuing debentures for 80*l.*, then no doubt this transaction could not stand; but no such case is sought to be made out. Moreover, the shares can have no value until the debentures are paid in full, and it

(1) [1892] A. C. 125.
(2) [1895] 1 Ch. 771.
(3) [1897] A. C. 299.
(4) [1897] 1 Ch. 796, 831, 836.
(5) (1888) 38 Ch. D. 415.

C. A. 1904 MOSELY v. KOFFYFONTEIN MINES, LIMITED.

is highly improbable that any one would exercise the option of taking shares in exchange for debentures unless the shares were at a premium.

Buckmaster, K.C., in reply. If this is an arrangement which in fact may be made use of by the debenture-holder as a device for obtaining shares at a discount, the cases shew that the bona fides of the parties who proposed the scheme is immaterial.

Cur. adv. vult.

May 20. VAUGHAN WILLIAMS L.J. (after stating the facts). The basis of the motion was that the issue of debentures, according to this scheme, constituted, or at all events would cover, the issue of shares at a discount—that is to say, 100 1*l.* shares fully paid at a price of 80*l.* There is, of course, no doubt about the obligation of a shareholder to pay to the company the full amount of his shares, as Lord Macnaghten pointed out in the *Ooregum Case* (1), continuing as long as anything remains unpaid on his shares, but the liability, as the law now stands, and as it stood in 1862, can be discharged by payment in money, or (with the consent of the company) by payment in money's worth, and the Court will not, if there is a valid contract, which since the repeal of s. 25 of the Act of 1867 no longer requires registration, by the company for the acceptance of something of substantial value as money's worth, inquire into the adequacy of the consideration: see *In re Wragg, Ld.* (2) But the cases decide that a man must really pay for the shares. And, further, that, if the contract makes it manifest on its face that the taker of the shares is paying less than their nominal cash value, he may be liable for the balance. If the consideration is illusory, or if it permits an obvious money measure to be made shewing that discount was allowed, or if the shares are openly issued at a discount, the shareholder may be called on to pay the balance in cash. It seems obvious, therefore, that, if the company propose to issue shares under conditions which disclose any of the features to which I have referred, the person getting the allotment of

(1) [1892] A. C. 145. (2) [1897] 1 Ch. 796.

shares would pay for them less than their nominal cash value, and such an issue ought to be restrained. Now it seems to me in the present case that the immediate consideration for the issue of shares to a debenture-holder demanding such allotment in exchange for, or in satisfaction of his debenture, is clearly the surrender of the debenture, and the mere fact that the debenture was purchased at a discount of 20 per cent. will not afford an obvious money measure shewing that a discount was allowed in the price of the shares. Test it in this way. Suppose the debentures to have been issued at a discount of 20 per cent., and subsequently, quite independently of any contract at the time of the issue of the debentures, the company is minded to buy up as many of the debentures as the debenture-holders will sell, allotting 100 1*l.* shares in exchange for a 100*l.* debenture, could it possibly be said that those shares were issued at an obvious discount? I think not. The surrender of the 100*l.* debenture might well be of the full money's worth of 100*l.* cash, and in the great majority of cases would be so. The question therefore arises, Does it make any difference that the bargain to issue the 100 1*l.* shares in exchange for the 100*l.* debenture issued at the price of 80*l.* was part and parcel of the consideration for the issue of the 100*l.* debenture at the price of 80*l.*? It seems to me that such a bargain might be a very good bargain for a company to make who wished to borrow on debentures a large sum of money required for the development of the enterprise of the company. It is true, however, that it might be a very bad bargain for the company, and, what is really essential, such a bargain might enable the debenture-holders who claim the allotment of shares to escape the statutory obligation to pay the full nominal amount of their shares. If the debentures were exchanged for shares immediately after the issue of the debentures, the practical result would be that the shares, although nominally issued in exchange for the surrender of debentures, would really be issued at a discount—i.e., 100 1*l.* shares for a payment of 80*l.* The answer given by the company to this is, that as a matter of business no man would surrender a 100*l.* debenture, which would always be entitled to

C. A. 1904 MOSELY v. KOFFYFONTEIN MINES, LIMITED. Vaughan Williams L.J.

payment in full before the shareholders could touch a penny, in exchange for 100 1*l.* shares, unless and until such shares were selling at par in the market, and probably not unless and until such shares were at a premium. It is said in answer to this that it is not impossible, especially as the circular contemplated the issue of debentures to shareholders, that such shareholders might, for the purpose of Stock Exchange operations, exchange immediately their debentures for shares. The fact, however, clearly appears that the bargain referred to in the circular has this blot, that it might result in shares being issued practically at a discount. I think that the real question is, Does this bargain give to the company that which the company as business men might fairly regard as money's worth for the full nominal value of the shares? It is not sufficient for the company to say the bargain was made in good faith. The company must at least establish that there is no obvious money measure on the face of this bargain shewing that the shares were issued at a discount. Is this money measure made obvious by the fact that the company bind themselves at any time after the issue of the debentures to allot shares to the full nominal value of the debentures, although those debentures were issued at a discount of 20 per cent.? The case is on the border line, but I am inclined to think that Buckley J. ought to have issued the injunction asked for, on the ground that the issue of debentures on the proposed terms was open to abuse, even if the agreement was not illusory, but a real agreement honestly made.

The appeal must be allowed.

I wish to add one word before I leave this case. It was established long ago that the obligation of a shareholder to pay the full nominal value of his shares need not be satisfied in cash, but might be satisfied in money's worth. It has also been held that the Court will not, if it is satisfied that there is an honest bargain under which the money's worth is paid, inquire into the adequacy of the consideration. These two propositions have been affirmed by the highest tribunal, and I am not suggesting for a moment that the cases which established them were not properly decided, having regard to the

terms of the Companies Act, 1862; but I hope that the day may come when it will be gravely considered by the Legislature whether it is not for the advantage of the community, and in particular of the commercial community, that an Act should be passed that in all cases the full nominal value of the shares shall be paid in cash and nothing else. I am satisfied from my own judicial experience in the administration of companies that such a law would have a tendency to benefit the companies themselves, and also to check a great deal of unwholesome speculation on the Stock Exchange which is largely fed and supported by operations undertaken by vendors, promoters, and others, for the purpose of unloading fully paid shares which they have been allowed to satisfy by giving what is called money's worth instead of making a cash payment.

STIRLING L.J. I am of opinion that this appeal ought to be allowed on the short ground that there has been pointed out a blot in the scheme which entitles the plaintiff to relief.

We have before us the form of debenture which is proposed to be issued in pursuance of the scheme, and under condition 10 of that debenture any person having paid 80*l.* to the company, and having received in exchange for such payment a debenture for 100*l.*, may forthwith leave at the registered office of the company a notice in writing directing the company to allot and issue to him 100 fully paid shares of 1*l.* each in the company, and the company upon the surrender of the debenture will be bound to comply with the direction. If the company does so comply, will the shares be validly issued? To my mind the result obvious on the face of the transaction will be the issue of shares of the nominal value of 100*l.* in consideration of the payment of 80*l.* only in cash—a transaction which is prohibited by the Legislature: see *Ooregum Gold Mining Company of India* v. *Roper* (1) and *Welton* v. *Saffery*. (2) It is said that the issue of the debentures is not made with any intention of evading the rule which forbids the issue of shares at a discount, and I am quite willing to believe that no such intention exists on the part of the directors of this company.

(1) [1892] A. C. 125. (2) [1897] A. C. 299.

C. A. 1904 MOSELY v. KOFFYFONTEIN MINES, LIMITED. Stirling L.J.

Nevertheless, if in fact the shares are issued at a discount, the honesty or good intentions of the contracting parties will not avail them, as is clearly established by the cases I have just mentioned. It is further said that although the result which I have pointed out may be possible, it is most improbable. I do not feel sure of this, for the shares of the company are dealt in on the Stock Exchange, and are of a highly speculative nature, and I cannot tell what steps the speculator in these shares may see fit to take in order to enable him to obtain control of the market. But I think that the possibility of such a transaction taking place is sufficient to entitle the plaintiff shareholders to an injunction of some kind. I desire in support of that view to refer to a passage in Lord Watson's speech in *Ooregum Gold Mining Company of India* v. *Roper* (1), which was partly cited by Buckley J. in his judgment. Lord Watson said: "It has been decided that, under the Act of 1862, shares may be lawfully issued as fully paid up, for considerations which the company has agreed to accept as representing in money's worth the nominal value of the shares. I do not think any other decision could have been given in the case of a genuine transaction of that nature where the consideration was the substantial equivalent of full payment of the shares in cash. The possible objection to such an arrangement is that the company may over-estimate the value of the consideration, and, therefore, receive less than nominal value for its shares. The Court would doubtless refuse effect to a colourable transaction, entered into for the purpose or with the obvious result of enabling the company to issue its shares at a discount; but it has been ruled that, so long as the company honestly regards the consideration given as fairly representing the nominal value of the shares in cash, its estimate ought not to be critically examined. That state of the law is certainly calculated to induce companies who are in want of money, and whose shares are unsaleable except at a discount, to pay extravagant prices for goods or work to persons who are willing to take payment in shares. The rule is capable of being abused, and I have little doubt that it has been liberally construed in

(1) [1892] A. C. 136.

practice." Bearing in mind that the rule is capable of abuse, and it appearing, as I say, on the face of the documents we have before us that there is here a possibility of the scheme as it now stands being made use of with the result that shares will be issued at a discount, I think that an injunction ought to be granted.

COZENS-HARDY L.J. This appeal raises a highly important and very difficult question. Is it competent for a limited company in consideration of 80*l.* to contract to issue a fully paid share of 100*l.* whenever requested so to do? Put in that bare form, the answer to the question admits of no doubt. The transaction would result in the issue of shares at a discount. It is, however, urged that all objection is removed if the 80*l.* is advanced to the company by way of loan upon the terms that the company shall pay 100*l.* at a future date with interest in the meantime, and shall give the lender the option *at any time* to demand a fully paid 100*l.* share in exchange for the 100*l.* debenture. The issue of the debenture at a discount is admittedly lawful, and it is urged that the result of the issue of the debenture is that the company will be legally indebted in the sum of 100*l.* payable at a future date, and that, if and when the debenture-holder gives a notice to the company, such as is contemplated by condition 8 (*b*) of the debenture in the present case, the 100*l.* will become immediately payable by the company, and this debt will be cancelled on the allotment of a fully paid share of 100*l.* The company will thus have received 100*l.*, and the share will not have been issued at a discount. Now, it is obvious that such a scheme *may* be used as a means for issuing shares at a discount, the debenture being issued on one day and surrendered on the next day. It would be idle to deny in such circumstances that 80*l.* was the only cash payment for the 100*l.* shares. Nor would it avail the shareholder to assert that he had paid for his share otherwise than in cash by surrendering his debenture for 100*l.*, inasmuch as, to use the language of Vaughan Williams J. in *Chapman's Case* (1), it would be manifest on the face of the

(1) [1895] 1 Ch. 771.

C. A. 1904 MOSELY v. KOFFYFONTEIN MINES, LIMITED. Cozens-Hardy L.J.

contract that the shareholder was really paying less than the nominal cash value. I do not think we ought to consider the motive or intention of the company in issuing the debentures in this form. The *Ooregum Case* (1) disposes of any such idea. I assume in favour of the directors that, from a business point of view, the transaction is expedient, but that is unimportant if the transaction is contrary to the policy of the Act of Parliament. Nor do I think we ought to consider the probability that this option will not be exercised until some distant future date. But if we are to consider it, I regard shares in a mining company of this nature as gambling counters for use on the Stock Exchange, and I can readily imagine that, for the purpose of creating or destroying a "corner," an option of this nature may be of great and immediate value to speculators on the Stock Exchange. In my opinion, an injunction ought to be granted to restrain the directors from carrying into effect the proposed allotment of debentures pursuant to the scheme in the circular of April 25 on this short and simple ground—that the directors propose thereby to confer an immediate right to demand a 100*l.* share in consideration of a cash payment of 80*l.* only. I desire to guard myself against the supposition that the conclusion at which I have arrived involves the proposition that under no circumstances can a debenture be issued at a discount which may confer a right *at some future date* to demand a fully paid share in exchange for the debenture. It is sufficient to say that whenever such a question comes before the Court it will be discussed and decided with the care and deliberation which its importance demands.

VAUGHAN WILLIAMS L.J. The injunction will be to restrain the issue of debentures in this form and pursuant to this scheme.

Solicitors: *Cohen & Cohen; Ingle, Holmes, Sons & Pott.*

(1) [1892] A. C. 125.

H. B. H.

C. A.
1904
June 20.

In re SPARK'S TRUSTS.
SPARK *v.* MASSEY.

[1903 S. 4221.]

Separation Deed—Settlement on Children on Marriage—Resumption of Cohabitation.

APPEAL from a decision of Kekewich J. (1)

The question was whether a settlement in a separation deed in favour of the then existing children of the marriage was determined by reason of the fact that the husband and wife had resumed cohabitation. Kekewich J. held that the settlement remained in force.

The husband appealed.

Ward Coldridge, for the husband.
H. Greenwood, for the trustee of the deed.
Mossop, for the wife and children.

After the appellant's case had been opened the appeal was compromised upon the following terms:—

THE COURT (Vaughan Williams, Romer, and Cozens-Hardy L.JJ.) being of opinion that the compromise hereinafter mentioned is for the benefit of the infant respondents, and approving the compromise on their behalf, by consent of all other parties and by way of compromise, declare that the agreement dated February 25, 1893, is to be construed as if the trusts in favour of the children were extended to all the children of the marriage, whether born before or after the separation. The trustee to be at liberty to pay the costs of all parties (his own as between solicitor and client) out of the fund.

Solicitors: *J. Campion; Mossop & Rolfe.*

(1) [1904] 1 Ch. 451.

H. B. H.

C.A. 1904 June 22.

E. M. BOWDEN'S PATENTS SYNDICATE, LIMITED *v.* HERBERT SMITH & CO.

[1903 E. 750.]

Patent Action—Infringement—Practice—Parties—Title to Patent at date of Writ—Application for Payment—Assignment of Benefit of Protection—Equitable Assignee—Legal Owner not a Party—Amendment—Rules of Supreme Court, 1883, *Order* XVI., *r.* 11.

Appeal from a decision of Warrington J. (ante, p. 86) dismissed on the ground that there was no order against which the plaintiffs could appeal.

THIS was an appeal from a decision of Warrington J. (1) The action was brought for infringement of patent.

At the trial of the action, before the plaintiffs' case was completed, the learned judge held that the plaintiffs were not entitled to maintain their action without adding the executors of the patentee as co-plaintiffs. The plaintiffs then asked leave to amend their writ and statement of claim in accordance with this decision; and leave to amend was granted upon terms of allowing the defendants to amend their defence and particulars of objection, the costs of the trial incurred up to that date and any costs thrown away by reason of the necessity of making the amendment to be the defendants' costs in any event. The plaintiffs appealed.

The notice of appeal asked that this decision and order might be reversed, and that the trial of the action might be allowed to proceed without the plaintiffs amending the writ and the statement of claim in the manner proposed, and that the costs allowed to the defendants and the costs of the appeal should be the plaintiffs' in any event.

Moulton, K.C., T. Terrell, K.C., and *E. F. Lever*, for the plaintiffs.

A. J. Walter and *Sinclair*, for the defendants.

THE COURT (Vaughan Williams, Romer, and Cozens-Hardy L.JJ.), without calling on counsel for the respondents,

(1) Ante, p. 86.

dismissed the appeal. They were of opinion that, inasmuch as the plaintiffs had elected to amend instead of having the action dismissed, there was no order against which they could appeal.

C. A. 1904 E. M. BOWDEN'S PATENTS SYNDICATE, LIMITED v. HERBERT SMITH & Co.

Solicitors: *A. Withers; Phillips & Boyle.*

H. B. H.

JOSEPH CROSFIELD & SONS, LIMITED *v.* MANCHESTER SHIP CANAL COMPANY.

C. A. 1904 *Jan.* 26, 27, 28, 29; *March* 15.

[1902 J. 324.]

Company—Private Act—Statutory Obligations—Statutory Agreement—Public and Private Rights—Protective Enactments—Default of Company—Disputes—Arbitration Clause—Compulsory Reference—Declaration of Rights, Action for—Damages—Injunction—Jurisdiction, Ouster of—Construction of Statute—Dismissal of Action—Staying Action till further Order—Practice—Pleading—Ouster of Jurisdiction, Omission to plead—Trial of Action—Amendment.

An arbitration clause in a private Act of Parliament, such as a Railway or Canal Act, will oust the jurisdiction of the Court in any case of difference between the parties named falling within the language of the clause, where the clause, either by express words or by necessary implication, imposes upon both parties an obligation of such a nature as to force them to have their differences settled, not by the ordinary tribunals of the country, but by reference to arbitration, and not merely to render it the duty of the Court to enforce the clause when either party insists on a reference to arbitration.

Sect. 88 of a Canal Act of 1885 enacted that "for the protection of the corporation of W. and of traders and others carrying on business at or near W. the following provisions, unless otherwise agreed on between the corporation and the company, shall have effect." Then followed numerous sub-sections imposing obligations on the company, some for the benefit of the corporation, others for the benefit of the traders, and others for the benefit of both. A further sub-section provided that "If any difference shall arise between the company and the corporation as to the true intent and meaning of this section, or as to anything to be done or not to be done thereunder, such difference shall be determined by an engineer" to be appointed as therein mentioned.

In 1896, the company having failed to carry out certain of their statutory obligations, an agreement was entered into between them and the corporation of W. (no traders of W. being parties) modifying those

C. A.
1904
JOSEPH CROSFIELD & SONS, LIMITED v. MANCHESTER SHIP CANAL COMPANY.

obligations and conferring certain additional rights upon the traders, and also providing that, save as therein mentioned, nothing therein should affect the rights of the corporation and the traders under any Acts relating to the company or otherwise. Then followed an arbitration clause substantially similar, mutatis mutandis, to that in the Act of 1885. That agreement was scheduled to and confirmed by an Act of 1896 conferring further powers on the company.

The company, however, failed to carry out their obligations under their two Acts and the agreement, and an action was accordingly brought against them by certain traders of W., both individually and on behalf of themselves and all other traders of W., and by the corporation, to enforce those obligations. At the trial a preliminary objection was taken by the company, which had not been raised by the pleadings, that by the Acts and agreement the jurisdiction of the Court was ousted and the questions in dispute should be determined by arbitration; but the objection was overruled by Byrne J., who eventually gave judgment for the plaintiffs. On appeal, the defendants again raised the objection:—

Held, by Vaughan Williams and Stirling L.JJ., that the objection prevailed as to both the traders and the corporation, but, by Cozens-Hardy L.J., as to the corporation only.

Caledonian Ry. Co. v. *Greenock and Wemyss Bay Ry. Co.*, (1874) L. R. 2 H. L. Sc. 347, and *London, Chatham and Dover Ry. Co.* v. *South Eastern Ry. Co.*, (1888) 40 Ch. D. 100, considered.

In a proper case the Court will allow an objection of ouster of jurisdiction to be raised at the trial of an action, though not previously raised by the pleadings, and will treat the pleadings as amended accordingly.

THE defendants, the Manchester Ship Canal Company, were a company incorporated under the Manchester Ship Canal Act, 1885, for the purpose of constructing a canal between Manchester and Liverpool which would occupy, in part of its course, the bed of the river Mersey down to a certain point. Sect. 88 of the Act commenced thus: "For the protection of the corporation of Warrington (in this section referred to as 'the corporation') and of traders, manufacturers, and others carrying on business at or near Warrington, the following provisions, unless otherwise agreed on between the corporation and the company, shall have effect." Those provisions were contained in numerous sub-sections relating to the maintenance and user of the canal and works, some of them being intended for the benefit of the corporation, others for the benefit of the traders and other persons carrying on business in or near Warrington (such as sub-s. 2, which entitled them to the user

of portions of the canal and of the river Mersey upon certain conditions therein defined), and others for the benefit of both. One of the last-mentioned group of sub-sections was sub-s. 14, which provided that "The company shall, before the canal be opened for traffic, at their own cost dredge the bed and banks of the river Mersey and for ever after maintain the same dredged so that at all times there shall be a depth of eight feet of water at low water of spring tides between" certain specified points, being so much of the bed of the river as bordered the borough of Warrington.

Another sub-section (22) was a special arbitration clause, as follows: "If any difference shall arise between the company and the corporation as to the true intent and meaning of this section or as to anything to be done thereunder, such difference shall be determined by an engineer to be appointed (unless otherwise agreed on) on the application of the company or the corporation by the Board of Trade, whose decision shall be final and binding on both parties, and the costs of the reference shall be borne as he shall direct."

Part 10 of the Act, which was headed "Miscellaneous," included s. 202, which was a general arbitration clause as follows: "If any question arise between the company and any person touching anything to be done or not to be done, or any money to be paid under the provisions of this Act, then, unless by this Act otherwise expressly provided, such question shall be determined by arbitration in manner provided by the Railways Clauses Consolidation Act, 1845."

By the end of the year 1893 the defendant company had almost completed their canal, but had only recently begun the dredging required by s. 88, sub-s. 14, of their Act, and it was found impossible to complete it before January 1, 1894, the date fixed for the opening of the canal. Negotiations accordingly took place between the company and the corporation of Warrington with reference to that matter, and in the end an agreement was made on December 12, 1893, between the corporation and the company, whereby the company undertook to complete the dredging by July 1, 1894. The agreement also contained provisions enabling the traders and manufacturers

C. A. 1904 JOSEPH CROSFIELD & SONS, LIMITED v. MANCHESTER SHIP CANAL COMPANY.

of Warrington to carry goods free of tolls along certain portions of the canal until the dredging in question had been completed.

The defendant company, however, failed altogether to complete the dredging, and from the date of the said agreement until 1895 the traders and manufacturers of Warrington used the portions of the canal mentioned in the agreement free of tolls.

Towards the end of 1895 further negotiations took place between the company and the corporation, which resulted in a further agreement being made between them on April 9, 1896. That agreement recited the prefatory words of s. 88 of the Act of 1885, also sub-s. 14, and the agreement of 1893; also that certain disputes had arisen between the company and the corporation, and that for the purpose of settling those disputes they had agreed to execute those presents. Then followed this recital: "And whereas the traders, manufacturers, and all other persons now or hereafter carrying on business at or near Warrington are entitled to use portions of the canal and river" and other works "on the terms and conditions defined in sub-s. 2 of s. 88" of the Act of 1885, "and the corporation and the company have agreed to alter those terms and conditions as hereafter mentioned." Then the agreement, by clause 1, slightly modified the dredging limits specified in s. 88, sub-s. 14, of the Act. It also provided (clause 2, sub-s. (*e*)) that the rights and privileges given to the traders and manufacturers of Warrington by the agreement of December 12, 1893, should forthwith cease; and by clause 4 the company bound themselves effectually to execute and complete at their own cost the several dredging and other works prescribed by that agreement. By clauses 6, 7, 8, and 9 it was provided that, if the company failed to maintain the channel by the dredging aforesaid, so that navigation was obstructed, the traders and manufacturers of Warrington should have the right of using certain specified portions of the canal, and also the portion of river bed so required to be dredged, free of tolls and dues until the completion of the channel; that if the company failed to comply with the provisions of that agreement after six months' notice in writing

from the corporation the rights, powers, and privileges of the corporation and the said traders and manufacturers under the Act of 1885 should revive and have effect, notwithstanding that agreement or the agreement of December 12, 1893, and as if those agreements had never been executed; and that, save as thereinbefore expressly mentioned, nothing in that agreement should affect, lessen, or take away any rights, powers, and privileges enjoyed by or conferred upon the corporation and the traders and manufacturers of Warrington under or by virtue of any Acts relating to the company or otherwise; and, save as aforesaid, such rights, powers, and privileges were thereby reserved accordingly.

Clause 10 was an arbitration clause as follows: "If any difference shall arise between the company and the corporation as to the true intent and meaning of this agreement, or as to anything to be done or not to be done thereunder, such difference shall be determined by an engineer to be appointed (unless otherwise agreed on) on the application of the company or the corporation by the president for the time being of the Institution of Civil Engineers, whose decision shall be final and binding on both parties, and the cost of the reference shall be borne as he shall direct."

Clause 12 provided that "The corporation shall have all rights and privileges under and shall be deemed to be traders within the meaning of this agreement."

By the Manchester Ship Canal Act, 1896, further powers were given to the defendant company, and the agreement of April 9, 1896, was scheduled thereto. Sect. 43 of that Act was in the following terms: "The terms of agreement set forth in the schedule to this Act are hereby confirmed and made binding upon the mayor, aldermen, and burgesses of the borough of Warrington and the company as if the same were contained in an agreement duly entered into by those parties and confirmed by Act of Parliament, and the agreement dated the 9th day of April, 1896, and made between the same parties is hereby declared to be null and void so far only as the same differs from the terms of agreement hereby confirmed."

C. A. 1904 JOSEPH CROSFIELD & SONS, LIMITED v. MANCHESTER SHIP CANAL COMPANY.

The traders and manufacturers of Warrington, and the corporation of the borough, complained that the defendant company had failed to carry out the dredging provisions of the agreement of April 9, 1896, so that navigation had been impeded; that in spite of that agreement the company had claimed payment of tolls and dues from the traders and manufacturers using the canal, alleging that as from the date of that agreement they were not entitled to free navigation thereof, and payments had from that date been paid to the company in respect of such dues under protest; that notwithstanding notices and complaints frequently given and made to the company, calling their attention to the fact that they had failed to comply with their statutory obligations to dredge and maintain a proper channel, and requiring them to comply with those obligations, they had insisted on payment of tolls and dues; and that by reason of the said acts and defaults of the company the traders and manufacturers had suffered and would continue to suffer serious loss and damage.

Accordingly, this action was brought by three companies or firms in Warrington, "on behalf of themselves and all others the traders, manufacturers, and others carrying on business at or near Warrington," and by the same companies or firms "in their own respective rights," and by the corporation of Warrington, against the canal company, claiming (1.) a declaration that the defendant company had, since April 9, 1896, been and now were under and by virtue of the Manchester Ship Canal Acts, 1885 to 1896, and the scheduled agreement of April 9, 1896, bound at their own cost to dredge and maintain dredged the channel specified in that agreement; (2.) a declaration that in the period during which the defendant company had failed, or so long in the future as they should continue to fail, to discharge that obligation, the traders and manufacturers who were at the date of the said agreement, or thereafter had been or should be carrying on business at or near Warrington, had possessed and would possess the right of navigation over the portions of the canal and river specified in the said agreement free of all tolls and dues; (3.) that the defendant company might be ordered to repay to the plaintiffs, the three companies

or firms, all dues and tolls paid by them since the date of the said agreement in respect of such navigation, and that for the purpose of ascertaining the amounts so paid all necessary accounts and inquiries might be taken and made; (4.) payment of damages to the last-named plaintiffs for breach by the defendant company of their obligations under the said agreement and statutes; and (5.) an injunction against further breaches.

In their statement of defence the defendant company denied that they had committed any breach of their obligations, and alleged that they had taken all proper and necessary steps for maintaining the channel in question, and had for that purpose always provided and used proper dredging appliances. They also alleged that difficulties in dredging the channel had been increased by the plaintiffs, or some of them, improperly and unlawfully discharging manufacturers' refuse into the river, and that their acts had seriously obstructed the defendant company in the discharge of their obligations. This allegation was, however, denied by the plaintiffs in their reply.

Upon the action coming on for trial before Byrne J., the defendant company raised the preliminary objection—though this had not been raised by the pleadings—that under the defendant company's Acts and the scheduled agreement of April 9, 1896, the parties had agreed to refer all disputes to arbitration, and that, therefore, the present dispute ought to be so referred, and the Court had no jurisdiction to entertain the action at all. The objection was not argued at any length, and his Lordship overruled it, whereupon the trial proceeded. It occupied several days, with the result that the learned judge found, upon the evidence, that the defendant company had failed to discharge their obligations, and gave judgment for the plaintiffs containing declarations to the effect claimed, with a direction for an inquiry as to damages as from and including January 1, 1900, the plaintiffs waiving any claim for damages prior to that date. From that judgment the defendant company appealed. Upon the appeal coming on for hearing, the same preliminary objection was taken as in the Court below. The objection was argued on January 26, 27, 28, and 29, 1904.

C. A. 1904 — JOSEPH CROSFIELD & SONS, LIMITED v. MANCHESTER SHIP CANAL COMPANY.

Moulton, K.C., Cripps, K.C., Pickford, K.C., O. L. Clare, and *Aubrey T. Lawrence,* for the canal company. Having regard to the provisions as to arbitration in the original Act, and also in the agreement affirmed by the subsequent Act, the jurisdiction of this Court is ousted, and the matter in dispute must be referred to an arbitrator accordingly. Clause 10 of the agreement of April, 1896, is clear. It is a condition precedent to bringing an action that the plaintiffs should be in a position to shew that the dredging has not been duly carried out; until this has been done the Court has no jurisdiction. The provisions of s. 88 of the 1885 Act are to apply "unless the parties otherwise agree." The judgment of Byrne J. overruling this preliminary objection on the question of the jurisdiction of the Court cannot be supported. If the Court has no jurisdiction a mere waiver of any objection on this head will not confer jurisdiction, and the objection is not waived by pleading: *London Corporation* v. *Cox.* (1) The statement of defence is quite sufficient as it stands to enable this objection to be raised now; but even if it were not it is only a question of amendment, for which leave would be given.

Bousfield, K.C., Hughes, K.C., and *F. Thompson,* for the plaintiffs. For years ineffectual complaints have been made by the plaintiffs as to the unsatisfactory condition of the ship canal, and of the non-fulfilment of their obligations by the company, and at last the plaintiffs were driven to commence this action. No suggestion was ever made until the matter had come into Court and all the expense had been incurred that the Court had no jurisdiction. The point is not raised by the statement of defence. Sect. 88, sub-s. 22, is the common form in cases of this kind. No case can be found where a simple clause of this kind, if put into a private Act, ousts the jurisdiction of the Court. The onus is on the appellants to shew that by necessary implication Parliament intended by this clause to take away the jurisdiction of the Court. It is too late now to raise this objection; the defendants submitted to the jurisdiction, put in their evidence, and took their chance of obtaining judgment in their favour on the

(1) (1867) L. R. 2 H. L. 239, 261.

merits. In *Caledonian Ry. Co.* v. *Greenock and Wemyss Bay Ry. Co.* (1), one of the parties by his plea insisted on his right under the agreement to withdraw the case from the jurisdiction of the ordinary Courts, as is pointed out in *London, Chatham and Dover Ry. Co.* v. *South Eastern Ry. Co.* (2), a decision in favour of the contention that it is now too late to raise this objection. The ground of the decision in *Caledonian Ry. Co.* v. *Greenock and Wemyss Bay Ry. Co.* (1) was that in that case the Act went on to require the company "to implement and fulfil all the provisions and stipulations in the said agreement contained," and thus imposed an obligation to pursue a particular remedy which ousted the jurisdiction of the Court: *Manchester Ship Canal Co.* v. *Manchester Racecourse Co.* (3) There is nothing in the present case to shew that Parliament intended to force the parties to carry out this voluntary agreement: *London and North Western Ry. Co.* v. *Billington* (4); *Countess of Rothes* v. *Kirkcaldy and Dysart Waterworks Commissioners* (5); *Ford's Hotel Co.* v. *Bartlett.* (6)

Even if it be held that the jurisdiction of the Court is ousted as regards the corporation, the traders are not debarred from suing in the ordinary Courts. Sect. 88 of the Act of 1885 is framed in their interest, and they are not bound by any of these arbitration clauses. They must therefore be at liberty to enforce their rights in the ordinary manner: *Herron* v. *Rathmines and Rathgar Improvement Commissioners* (7); *Davis & Sons* v. *Taff Vale Ry. Co.* (8)

Cripps, K.C., in reply, referred to *Crisp* v. *Bunbury* (9) and *Groves* v. *Lord Wimborne.* (10)

Cur. adv. vult.

March 15. VAUGHAN WILLIAMS L.J. This is an appeal by the defendants, the Manchester Ship Canal Company, in an action brought against them in which the plaintiffs are the

(1) L. R. 2 H. L., Sc. 347.
(2) 40 Ch. D. 100.
(3) [1900] 2 Ch. 352, 361.
(4) [1899] A. C. 79.
(5) (1882) 7 App. Cas. 694.
(6) [1896] A. C. 1.
(7) [1892] A. C. 498.
(8) [1895] A. C. 542.
(9) (1832) 8 Bing. 394; 34 R. R. 747.
(10) [1898] 2 Q. B. 402.

C. A. 1904

JOSEPH CROSFIELD & SONS, LIMITED v. MANCHESTER SHIP CANAL COMPANY.

Vaughan Williams L.J.

corporation of Warrington and certain traders of Warrington as representing the traders of Warrington generally, and also in their individual capacities. The object of the action is to enforce rights which they claim respectively to have against the ship canal company under a clause of an Act of Parliament, or under that clause as modified by an agreement affirmed by a subsequent Act of Parliament, or under that agreement.

The trader plaintiffs, in their individual capacities, although they include a claim for damages for the breach by the ship canal company of dredging obligations cast on them by the statute or by the agreement, in substance claim the return of tolls which were paid by the traders on the demand of the ship canal company for the user of the canal, which user was necessitated by failure of the canal company to perform duties alleged by the plaintiffs to have been cast on the canal company, in respect of maintaining the channel of the river Mersey at a certain depth. The failure by the canal company to perform these duties would entitle the traders under the agreement scheduled to the Act of 1896 to navigate a portion of the canal free of all tolls and dues during such time as the said channel should be obstructed. The plaintiffs, generally, ask for declarations of rights. When the case came on for hearing the defendant company took a preliminary objection, which was this—that, having regard to the arbitration provisions contained as well in the original Act of Parliament as in the agreement affirmed by the subsequent Act, the jurisdiction of the Court is absolutely ousted, in the sense that the Court could not, even with the assent of all parties, entertain the action or dispose of a particular matter in difference essential to the maintenance of the action. I will observe here that the action really embodies three actions, and that it may be that the ousting of the jurisdiction may be effective as to one or more of the claims, although not effective as to all three actions or all the claims. This, however, would seem an unfortunate result, for it is obviously desirable that all these cases relating to the same alleged obligations of the canal company should be disposed of by the same tribunal.

The preliminary objection, so far as it is based on the

original Act, the Manchester Ship Canal Act, 1885, depends primarily on s. 88 of that Act. The section begins with these words: [His Lordship then read the prefatory clause of that section, and also sub-ss. 14 and 22 above quoted, and proceeded:—]

Thus far I have only dealt with the statute of 1885, but subsequently, in 1896, the company and the corporation, in the exercise of the power conferred by the words in the preface of s. 88, "Unless otherwise agreed on between the corporation and the company," agreed to modify the provisions of s. 88. I should here observe that, in my opinion, the power of agreement thus given in the prefatory clause of s. 88 is only a power to alter the provisions in that section as to the maintenance and user of the canal and works, and has no bearing whatever on the power of the corporation or the company to waive the provision contained in sub-s. 22. [His Lordship then proceeded to read the agreement, and with regard to the recital above quoted, commencing "And whereas the traders, manufacturers, and all other persons," said:—]

It will be observed that although it is rights of the traders and others carrying on business which are affected, it is the corporation and company who make the agreement; and this may be very important when one comes to consider whether, upon a breach of this agreement confirmed by statute affecting the rights of traders and others, an action based on the breach may be brought by the injured person, as is the case when an individual is injured by the breach of a statute passed for his benefit, provided such a remedy comes within the purview of the Legislature in the particular statute, which it is especially likely to do in a case in which the Act is not an Act of public and general policy, but is rather in the nature of a private legislative bargain between certain persons likely to be affected by the work authorized by a special Act and a body of undertakers as to the manner in which they will keep up certain public works. [His Lordship then went through the rest of the agreement, and after reading clauses 10 and 12 above quoted, and also the confirming section, 43, of the Act of 1896, proceeded:—]

C. A.
1904
JOSEPH CROSFIELD & SONS, LIMITED
v.
MANCHESTER SHIP CANAL COMPANY.
Vaughan Williams L.J.

I think I have now called attention to all the material parts of the statutory agreement. It will be observed that the right to recover the tolls can only arise under the statutory agreement, although other damages could be recovered by traders and manufacturers for breaches of the provisions of s. 88 affecting them, if indeed traders individually have a right of action within the purview of the Act of 1885. The right of the traders collectively to a declaration of rights, whether under the Act of 1885 or under the statutory agreement of 1896, I will consider presently.

I think that the only other matter which I have to call attention to before considering the preliminary point based on an alleged ouster of jurisdiction of the Court is s. 202 of the Act of 1885, which runs thus: "If any question arise between the company and any person touching anything to be done or not to be done or any money to be paid under the provisions of this Act, then, unless by this Act otherwise expressly provided, such question shall be determined by arbitration in manner provided by the Railways Clauses Consolidation Act, 1845." I may as well at once dismiss the consideration of s. 202. In my judgment it is quite unnecessary to resort to the arbitration clause contained in that section, even in the case of general damages or return of tolls claimed by the traders individually; for, whether such claims are based on the Act of 1885 or on the scheduled agreement, the claims cannot succeed unless the company are in default, and the company cannot be proved to be in default until their liability or obligation has been fixed: and if that liability or obligation can only be fixed by arbitration, the claim for damages or return of money paid for tolls must fail until the obligation or liability has been so fixed; and the same proposition is true of an action for declaration of obligation or liability.

I will now proceed to deal with the question whether the effect of sub-s. 22 of s. 88 is to oust the jurisdiction of the Court in the fullest sense of the word, that is to say, in the sense that jurisdiction cannot be given to the Court to determine a question the determination of which has to be relegated by Act of Parliament, even by the consent of the parties to the

litigation in Court. That a statute may thus bar a plaintiff from maintaining an action in a Court of law and compel him to pursue the course laid down by the statute cannot be doubted: see *Crisp* v. *Bunbury* (1), a case in which it is to be observed that, although there was a trial at Nisi Prius and a verdict for the plaintiff, the objection to the tribunal was allowed to prevail, without any plea to the jurisdiction, on a mere objection taken at Nisi Prius and reserved to be disposed of by the Court in Banc. The same case shews that it is not necessary that the jurisdiction of the Court should be barred by express words: it is sufficient if the jurisdiction is barred by necessary implication.

A great deal of argument was addressed to us as to when and under what circumstances a statutory arbitration clause will, in the full sense of the word, oust the jurisdiction of the Courts. Byrne J., on the authority of *Caledonian Ry. Co.* v. *Greenock and Wemyss Bay Ry. Co.* (2) and of the judgments of A. L. Smith and Chitty L.JJ. in *London and North Western Ry. Co.* v. *Donellan* (3), which were approved by the House of Lords in *Midland Ry. Co.* v. *Loseby & Carnley* (4), held that in the present case, if the matter had stood on the original Act independently of the words "unless otherwise agreed on," the jurisdiction of the Courts would have been ousted by an arbitration enactment raising a statutory duty which could not be waived. Thus far I agree with Byrne J.; but the learned judge went on to hold that the words in the prefatory clause of s. 88, "unless otherwise agreed on," rendered it competent, in case an action was brought, for one of the parties by his conduct to agree to waive the right to insist on arbitration. I cannot agree. I think, as I have already stated, that these words only refer to a modification of the provisions of s. 88. As to the ouster of jurisdiction, it was argued by Mr. Bousfield and Mr. Hughes that Byrne J. had misunderstood the decision of the House of Lords in the *Caledonian Railway Case* (2), and that the opinion of A. L. Smith and Chitty L.JJ. in *London and North Western*

(1) 8 Bing. 394; 34 R. R. 747.
(2) L. R. 2 H. L., Sc. 347.
(3) [1898] 2 Q. B. 7.
(4) [1899] A. C. 133.

C. A. 1904

JOSEPH CROSFIELD & SONS, LIMITED v. MANCHESTER SHIP CANAL COMPANY.

Vaughan Williams L.J.

Ry. Co. v. *Donellan* (1) had not been affirmed by the House of Lords on the appeal in *London and North Western Ry. Co.* v. *Billington* (2) or *Midland Ry. Co.* v. *Loseby & Carnley.* (3) I cannot agree. The suggestion that the speech of Lord Cairns in the *Caledonian Railway Case* (4) had been misunderstood was largely based on observations by Cotton and Bowen L.JJ. in *London, Chatham and Dover Ry. Co.* v. *South Eastern Ry. Co.* (5), by which those Lords Justices expressed doubts whether Lord Cairns meant to decide or meant to indicate his own opinion to the effect that the jurisdiction of the Courts was ousted. With deference to those Lords Justices, I think that a careful examination of the *Caledonian Railway Case*, as reported in L. R. 2 H. L., Sc. 347, in connection with the facts and pleadings as stated in 10 Ct. Sess. Cas. 3rd Series, 892, shews that Lord Cairns did mean to decide and indicate that the jurisdiction of the Court was ousted in respect of the particular matter in question. The matter stands thus: The plaintiffs there brought their action claiming payment, under certain clauses, 8, 9, and 14, of an agreement between the two companies, of one-fourth part of the balance of certain gross receipts after making certain deductions. The defendants pleaded to the whole action art. 18 of the agreement, whereby it was provided that, "All differences which may arise between the parties hereto respecting the true meaning or effect of this agreement, or the mode of carrying the same into operation, shall, from time to time, so often as any such questions or differences shall arise, be referred to arbitration in terms of the Railway Clauses Consolidation (Scotland) Act, 1845, and the provisions with respect to the settlement of disputes by arbitration contained in such Act shall be held to be incorporated with this agreement"; and the defendants pleaded that the action was excluded by that art. 18. The Lord Ordinary sustained the plea in law and dismissed the action. Against this decision there was an appeal, which was argued twice—once before four judges and once before seven. The first decision on

(1) [1898] 2 Q. B. 7.
(2) [1899] A. C. 79.
(3) [1899] A. C. 133.
(4) L. R. 2 H. L., Sc. 347.
(5) 40 Ch. D. 100.

appeal was simply to reverse the decision of the Lord Ordinary on the ground that the action was a simple action for a money debt, raising on the face of it no question falling under art. 18; and it was pointed out that the judge might still send a special point to an arbitrator if any question arose in the course of the cause which fell within the obligation to refer to arbitrators. By the second decision in the Court of Appeal it was further decided that the question raised by the defenders' second plea—that is to say, that the defenders "ought to be assoilzied, in respect that in none of the half-years in question did any balance of revenue remain after meeting the requisite charges, and that thus there was no sum divisible between the pursuers and the defenders' shareholders, in terms of the 9th article of the said agreement"—involved a difference between the parties respecting the true meaning or effect of the agreement; for what the Wemyss Bay Railway Company maintained was that, according to "the true meaning and effect of the agreement," the Caledonian Railway Company had a right to one-fourth of the profits only when the remaining three-fourths were sufficient to meet the interest on the debt. Lord Kinloch, in advising the opinion of the Court, said: "I am of opinion that the question thus raised is, in the sound sense of the agreement, a 'difference arising between the parties respecting the true meaning or effect of the agreement'"; and it was ordered, therefore, to supersede the consideration of the cause until the said question should be settled by arbitration in the manner prescribed. It was against this judgment that the Caledonian Railway Company appealed to the House of Lords; and the Lord Chancellor, Lord Cairns—having regard to the words of the Act to which the agreement between the railway companies had been scheduled, "and it shall be lawful for the company (that is, the Greenock and Wemyss Bay Railway Company) and the Caledonian Railway Company respectively, and they are hereby required, to implement and fulfil all the provisions and stipulations in the said agreement contained"—held that the arbitration clause had become a statutory obligation, and that the Act of Parliament excluded the jurisdiction of the Court to decide this question which had arisen

C. A. 1904 JOSEPH CROSFIELD & SONS, LIMITED v. MANCHESTER SHIP CANAL COMPANY. Vaughan Williams L.J.

in the course of this action, thus forcing the parties to have it settled, not by the ordinary tribunals of this country, but by arbitration. The case of *London, Chatham and Dover Ry. Co.* v. *South Eastern Ry. Co.* (1) was very different, because in that case the arbitration clause was contained in a voluntary agreement which the railway companies were authorized to enter into by the Railway Companies Arbitration Act, 1859, and which, although entered into under such authority, was nevertheless simply a voluntary agreement imposing no statutory obligation to arbitrate.

With regard to the contention that the judgments of A. L. Smith and Chitty L.JJ. in *London and North Western Ry. Co.* v. *Donellan* (2) were not approved by the House of Lords in *Midland Ry. Co.* v. *Loseby & Carnley* (3), and that the opinions of the Law Lords in *London and North Western Ry. Co.* v. *Billington* (4) shew this, I cannot agree. The last-mentioned case only decided that the jurisdiction was not ousted because there had been no difference existing between the parties before action, which is certainly not the fact in the present case.

Assuming then, as in my opinion we must, that the jurisdiction of the Court may be ousted by statutory provisions which have no express words to that effect, let us see what are the modes by which jurisdiction may be ousted. Sometimes the statute constitutes arbitration the only tribunal in which disputes between certain parties can be determined, and thus ousts the jurisdiction. Sometimes the jurisdiction is ousted because the statute has plainly said that some matter essential to be proved in a particular action shall only be determined by arbitration. The *Caledonian Railway Case* (5) seems to me to be an instance. In either case, if the arbitration provision thus enacted is for the public good and not for the benefit of individuals, no deficiency in pleading and no waiver by litigants can give the Court jurisdiction.

In my judgment, the intention of the Legislature as expressed

(1) 40 Ch. D. 100.
(2) [1898] 2 Q. B. 7.
(3) [1899] A. C. 133.
(4) [1899] A. C. 79.
(5) L. R. 2 H. L., Sc. 347.

in sub-s. 22 of s. 88 of the Act of 1885 is that, in regard to anything to be done or not to be done under s. 88, the engineer to be appointed by the Board of Trade is intended to be the only tribunal for the determination of what is the true intent and meaning of the section; so that under that sub-section the arbitrator has sole and exclusive jurisdiction to determine the obligations of the company under sub-s. 14. Sect. 88, in spite of its preface, cannot be regarded as merely embodying an agreement come to by the promoters of the bill and the corporation of Warrington in the course of the promotion. It provides for the protection of those who were parties to no agreement—traders, manufacturers, and others carrying on business at or near Warrington—because the Legislature thought it right that this section of the public should be so protected; and I cannot see that the fact that the preface authorizes the corporation and the company to agree on other provisions alters the character of the section. It is still a section passed in the public interest, and not merely the embodiment of private agreement. The corporation of Warrington are obviously deemed sufficient guardians of public interests to be entrusted with such modification of the provisions as receives the approval of the corporation and the company. It is perhaps a convenient place to mention—although, taking the view which I do of this case, it is not very important—that this power of the corporation goes rather to shew that the Legislature did not intend traders to have any direct remedy, either in an action by some on behalf of others, or in actions by individuals. I will now pass to the scheduled agreement.

The agreement is, by s. 43 of the Act of 1896, confirmed and made binding on the corporation and the company. The corporation and the company are the only parties to it, and it seems to me to follow that it is impossible for the traders to sue upon the agreement quâ agreement, and the rights of the traders seem to me to fall exactly within the words of Lord Watson in *Davis & Sons* v. *Taff Vale Ry. Co.* (1), where, after pointing out that in cases in which the provisions of a local and personal Act directly impose mutual obligations

(1) [1895] A. C. 542, 552.

C. A. 1904 JOSEPH CROSFIELD & SONS, LIMITED v. MANCHESTER SHIP CANAL COMPANY. Vaughan Williams L.J.

upon persons or companies, such provisions may be fairly considered as having this analogy to contract—that they must, as between those parties, be construed in precisely the same way as if they had been matter not of enactment but of private agreement, he goes on to say that it was in that sense that he observed in *Countess of Rothes* v. *Kirkcaldy and Dysart Waterworks Commissioners* (1), that such statutory provisions must be regarded as a contract between the parties, whether made by their mutual agreement or forced upon them by the Legislature; and he says that for all purposes of construction these observations apply, but not further. Then follow the words of Lord Watson, which seem to me to apply exactly to this case: "The provisions of a Railway Act, even when they impose mutual obligations, differ from private stipulations in this essential respect, that they derive their existence and their force, not from the agreement of parties, but from the will of the Legislature. And when provisions of that kind are not limited to the interests of the parties mutually obliged, but impose upon one or other or both of them an obligation in favour of third parties, who are sufficiently designated, I am of opinion that the obligation so imposed must operate as a direct enactment of the Legislature in favour of these parties, and cannot be regarded as a mere stipulation inter alios, which they may have an interest but have no title to enforce. These observations are not meant to apply to any case where a private contract made between two companies is scheduled to and confirmed by the Act; because, in such a case, the form of the enactment might be held to indicate that it is to operate as a contract, and not otherwise." It seems to me, therefore, that in the present case, if we are to regard the scheduled contract as a mere contract between the parties to it, the traders cannot sue upon such a contract; and if, on the other hand, we are to regard the Act of 1896 or the Act of 1885 as operating as a direct enactment of the Legislature in favour of the traders, neither the traders nor the company can get rid of such direct enactment by waiver or otherwise, unless, upon a true construction of the Act, the enactments appear to

(1) 7 App. Cas. 694, 707.

have been passed merely for the benefit of such persons and not in the interests of the public.

The outcome of these considerations is that, in my opinion, the preliminary objection ought to be allowed in respect of the whole action.

First, as to the statute, and the effect of sub-s. 22 of s. 88, it seems to me that, alike in respect of the claims of the corporation and of the traders collectively and individually, the action is based on default by the canal company in the performance of their obligation after dredging the bed and banks of the river Mersey, namely, "for ever after (to) maintain the same dredged, so that," &c.; or, if one treats sub-s. 14 of s. 88 as modified by clause 1 of the scheduled agreement, then for ever to maintain the channel dredged in accordance with the provisions of sub-s. 14, as modified by that agreement; and it matters not whether one takes the arbitration clause in sub-s. 22 of s. 88, or the arbitration clause in sub-s. 22 as modified by clause 10 of the scheduled agreement—in neither case can it be proved that there is a default in maintenance, if the parties differ as to the true intent and meaning of the words of the statute as in force with relation to the obligation to maintain, until that difference has been settled in the manner provided by the statute. Now, that there has been for a long time before the date of this action a difference between the corporation and the canal company as to the true meaning and intent of the provisions regulating the obligation to maintain, I cannot doubt; and it follows that the determination of this difference must go to arbitration before any action based on the statute can be brought. Then, as to an action by the corporation based on the agreement, as an agreement: in my opinion, the confirmed agreement, having regard to its frame and in particular to its modification under the statutory powers given by s. 88 and to the sub-sections to that section, cannot be relied upon by the corporation as a mere agreement containing provisions which can be waived by the consent of the parties. I think, therefore, that no action can be brought by the corporation based on the agreement quâ agreement.

The action of the traders collectively claiming declarations of

C. A. 1904 JOSEPH CROSFIELD & SONS, LIMITED v. MANCHESTER SHIP CANAL COMPANY. Vaughan Williams L.J.

right fails for the same reasons which I have given in regard to the action of the corporation making similar claims. The claim of the individual traders for return of tolls paid fails because it is essential to the maintenance of this claim that default by the canal company should be proved; but this cannot be done until the standard of duty has been determined by the statutory arbitrator, which has not yet been done. I think that the arbitration clause in s. 88 of the Act of 1885, and clause 10 of the agreement, prevent the traders in their individual capacity proving any default in fact by the canal company; but even if this were not so, I should be inclined to hold that, as regards the individual traders, jurisdiction is ousted by s. 202 of the Act of 1885. If, however, their action fails merely because something essential to their cause of action falls to be decided by arbitration, I think the action might be stayed and not dismissed.

With regard to the pleading, I agree with the contention that, although according to the old rules of pleading it was not necessary, modern practice has been to plead ouster of jurisdiction: see *Folkestone Corporation* v. *Brooks*. (1) But assuming that the pleading of the defendant company is faulty in this respect, I am clearly of opinion that the pleading ought to be treated as amended. No one was placed in any difficulty by the omission to plead, and the case, in my opinion, bears no analogy to those cases in which there is a refusal to stay after a step has been taken by the defendant in actions brought in contravention of an arbitration clause contained in a voluntary agreement.

In my judgment this appeal ought to be allowed.

STIRLING L.J. This is an action by certain traders and manufacturers carrying on business at or near Warrington, on behalf of themselves and all others the traders, manufacturers, and others carrying on business at or near Warrington, and also in their own respective rights, and the corporation of Warrington, as plaintiffs against the Manchester Ship Canal Company. The plaintiffs complain that the defendants have

(1) [1893] 3 Ch. 22.

failed to perform certain obligations imposed on them by Act of Parliament, and that damage has thereby been occasioned to the plaintiffs who are traders and manufacturers, in their individual capacity. They also allege that, in the events which have happened, the traders, manufacturers, and others near Warrington became entitled to a right of navigation over portions of the defendants' canal and the river Mersey, free of tolls, but that the defendants have insisted on payment of toll. In these circumstances the plaintiffs claim declarations as to their rights; repayment to the traders and manufacturers, plaintiffs in their own rights, of the tolls which they have been compelled to pay; payment of damages to the same plaintiffs for the defendants' breach of their statutory obligations; and an injunction. At the trial before Byrne J. a preliminary objection was taken that the jurisdiction of the Court as to the matters in dispute was ousted, and that the questions between the parties must be determined by arbitration; but this objection was overruled by the learned judge. Upon this appeal the same objection has been taken and argued, and we have now to dispose of it. [His Lordship then referred to s. 88 of the Act of 1885, and its sub-sections, to the agreement of April, 1896, and to s. 43 of the Act of 1896 confirming it, and proceeded:—]

There is no dispute that, either by action or by recourse to arbitration, the corporation of Warrington is entitled to enforce the provisions for its protection contained both in s. 88 of the Act of 1885, and of the agreement confirmed by the Act of 1896. The first question to be considered is whether the traders and others carrying on business at or near Warrington are entitled to enforce such of the provisions of s. 88 of the Act of 1885 as are intended for their benefit. These provisions are found in the form of legislative enactment, and do not arise merely out of a contract which has received statutory confirmation; and they are expressed to be for the protection of such traders and others. I think that the decision in *Davis & Sons* v. *Taff Vale Ry. Co.* (1) applies, and that the traders are entitled to enforce the provisions of the section.

Next, can they enforce the similar provisions of the agreement

(1) [1895] A. C. 542.

C. A. 1904 JOSEPH CROSFIELD & SONS, LIMITED v. MANCHESTER SHIP CANAL COMPANY. Stirling L.J.

confirmed by s. 43 of the Act of 1896? Those provisions do not take the form of legislative enactment, yet, seeing that by the terms of s. 88 of the Act of 1885 they are an authorized substitute for legislative enactment, it seems to me that the same right of enforcing them must exist. If, however, I rightly understand the way in which the plaintiffs in the present action shape their case, it may not be absolutely necessary to decide this point, for they base their claim on the provisions of s. 88 of the Act of 1885, but do not desire to enforce them to an extent beyond those contained in the agreement of 1896, which are less favourable to them.

I now come to the main question to be decided on the present occasion, namely, whether the corporation and the traders, or either of them, can enforce their claims by action, it being contended on behalf of the defendants that the provisions as to arbitration found in the Act of 1885 and the confirmed agreement of 1896 are such as to oust the jurisdiction of the Courts.

In support of this contention, reliance is first and principally placed on s. 88, sub-s. 22, of the Act of 1885. It is not really disputed that this enactment does impose on the company and the corporation an obligation to refer to arbitration any difference arising between them "as to the true intent and meaning of" s. 88, "or as to anything to be done or not to be done thereunder"; but there is a question as to the nature of the obligation, namely, whether it is such as, in the language of Lord Cairns—see *Caledonian Ry. Co.* v. *Greenock and Wemyss Bay Ry. Co.* (1)—"to force the parties to have their disputes settled, not by the ordinary tribunals of the country, but by a reference to arbitration"; or whether it is only such as to render it the duty of the Court to enforce the section when either party insists on a reference to arbitration: see *London, Chatham and Dover Ry. Co.* v. *South Eastern Ry. Co.* (2) This is important, for if the latter be the correct view, then it may be that in fact Byrne J. has held the defendants were too late in claiming a reference to arbitration; whereas in the former view the objection would be that the Court has no

(1) L. R. 2 H. L., Sc. 347, 350. (2) 40 Ch. D. 100.

jurisdiction to entertain the action, and it was properly raised. Now, the corporation of Warrington does not claim damages. The questions between it and the defendant company are: (1.) What is the true intent and meaning of sub-s. 14 of s. 88 of the Act of 1885 as varied by the agreement and statute of 1896; (2.) Whether the company has or has not duly dredged and maintained the bed and banks of the river Mersey. In my judgment both these are questions which fall to be decided by arbitration in accordance with sub-s. 22. This being so, and the obligation as to arbitration being imperative, and imposed by statute, it seems to me that the case falls within the terms used by Lord Cairns in advising the House of Lords in *Caledonian Ry. Co.* v. *Greenock and Wemyss Bay Ry. Co.* (1); and it is to be observed that Lord Chelmsford, Lord Hatherley, and Lord Selborne expressed their unqualified concurrence with what Lord Cairns said on that occasion. It is true that in the case just mentioned the circumstances were such that the same conclusion might have been arrived at even if the true nature of the obligation imposed on the parties to that litigation had been such as was held by the Court of Appeal to exist in the subsequent case of *London, Chatham and Dover Ry. Co.* v. *South Eastern Ry. Co.* (2) It is also true that in that case Cotton and Bowen L.JJ. (the former of whom had been counsel in the Scotch case) expressed doubts whether Lord Cairns really meant to decide or express an opinion that the jurisdiction of the Courts was ousted; and those doubts on the part of so high authorities have caused me very great difficulty. But the decision in *London, Chatham and Dover Ry. Co.* v. *South Eastern Ry. Co.* (2) (by which, of course, I am bound) is not precisely in point; and on the whole it seems to me that the better course is that this Court should follow the language of Lord Cairns, assented to by the other noble Lords, and that any mistake as to its meaning (if such there be) should be set right by a higher tribunal.

I agree with Vaughan Williams L.J. in thinking that the obligation to refer is not altered by the words "unless otherwise agreed on" which occur at the beginning of s. 88, and

(1) L. R. 2 H. L., Sc. 347. (2) 40 Ch. D. 100.

C. A. 1904

JOSEPH CROSFIELD & SONS, LIMITED v. MANCHESTER SHIP CANAL COMPANY.

Stirling L.J.

I do not desire to add anything to what he has said on that point.

Assuming, then, that the jurisdiction of the Courts is ousted in the case of difference as between the corporation and the company within s. 88, sub-s. 22, of the Act of 1885, I have to inquire whether this is also true as to the difference between the traders and the corporation. Now it is obvious that sub-s. 22 does not in terms extend to such differences; nor can I see that it makes the settlement of a difference between the corporation and the company a condition precedent to the bringing of an action by a trader against the company. Many of the provisions of s. 88 are of the highest importance to traders, but may affect the interests of the corporation very slightly. In the case of differences arising between a trader and the company as to these provisions, the corporation might reasonably be desirous to avoid controversy; and the Act, so far as I see, provides no means by which the corporation could be compelled to embark on what might prove to be an expensive contest before an arbitrator. Even where the corporation has an interest in the matter in dispute, the trader might be differently affected, and serious injustice might be done if he were to be held bound by arbitration proceedings between the corporation and the company to which he could not be directly a party.

It is lastly contended that the present case falls within the terms of s. 202 of the Act of 1885, namely: "If any question arise between the company and any person touching anything to be done or not to be done, or any money to be paid under the provisions of this Act, then, unless by this Act otherwise expressly provided, such question shall be determined by arbitration in manner provided by the Railways Clauses Consolidation Act, 1845." This section is found in Part 10 of the Act under the heading "Miscellaneous." To ascertain its effect, I think it is desirable to look back to the earlier portions of the Act and see what express provision has there been made on the subject of arbitration. [His Lordship then referred to several preceding sections of the Act which provided for arbitration in certain specific cases, and proceeded:—]

Sect. 202 appears to be a section of wide operation applicable to all matters falling within its terms for which no specific provision has been made elsewhere. It is a positive legislative enactment that all questions arising between the company and any person touching "anything to be done or not to be done" under the provisions of the Act shall be determined by arbitration in the way pointed out. That seems to me to extend to anything to be done or not to be done under s. 88.

Now the main question at issue between the company and the traders of Warrington is whether the company have or have not duly dredged, and maintained dredged, the bed and banks of the river Mersey; and that is a question as to a thing to be done or not to be done under s. 88. If that question, as between the company and the corporation of Warrington, is (as I think) to be settled by arbitration under s. 88, sub-s. 22, then it seems to me that for the same reasons it ought to be settled as between the company and the traders by arbitration under s. 202. It appears to me that it would be an anomaly if it were held that the differences between the company and the corporation must be settled by arbitration, while those on the same matters between the company and the traders need not. I do not think that the tolls and damages claimed by the trader plaintiffs are moneys to be paid under the provisions of the Act of 1885; but still, in accordance with the case of *Caledonian Ry. Co.* v. *Greenock and Wemyss Bay Ry. Co.* (1), the action ought to be stayed until the question which falls to be determined by the arbitration has been decided.

In my opinion, therefore, the action ought to be wholly stayed or dismissed as between the corporation of Warrington and the defendant company, and should be stayed until the determination of the main question as between the traders and manufacturers of Warrington and the defendant company.

COZENS-HARDY L.J. As I have the misfortune to differ from the majority of the Court, it is necessary that I should, as briefly as possible, state my own views.

This is an action in which the corporation of Warrington,

(1) L. R. 2 H. L., Sc. 347.

C. A. 1904 JOSEPH CROSFIELD & SONS, LIMITED v. MANCHESTER SHIP CANAL COMPANY. Cozens-Hardy L.J.

and certain traders carrying on business at Warrington, are co-plaintiffs, and the Manchester Ship Canal Company are defendants, and a preliminary objection has been raised that the jurisdiction of the High Court is ousted; or, in other words, that the High Court has no jurisdiction to entertain the action, and that the disputes between the parties must be decided by arbitration. Byrne J. has overruled this objection.

The question depends upon the proper construction and effect of a few sections in the Manchester Ship Canal Act, 1885, and the amending Act of 1896. The plaintiffs' case is shortly this. They say that the canal company were bound by statute to dredge and maintain dredged a certain portion of the river Mersey at a certain depth, and that they have not fulfilled this statutory obligation, and that heavy damages have been sustained by the individual traders by reason of this breach of duty on the part of the canal company. The traders also allege that they were entitled, in the events which have happened, to use a portion of the canal free from toll, and they seek to recover tolls which they paid under protest. Sect. 88 of the Act of 1885 is an elaborate section, obviously inserted in the interest of Warrington. [His Lordship then referred to that section, and its sub-sections, and after reading the arbitration clause, sub-s. 22, proceeded:—]

Now, it will be observed from the introductory words of the section that, although certain rights are given by the section to traders, power is left to the corporation and to the canal company by agreement to modify these provisions, but not, I think, to make entirely new and independent provisions. For this purpose the corporation was apparently treated as representative of the traders.

In 1896 an agreement dated April 9, 1896, was entered into between the corporation and the canal company, which was, I think, intended to operate and take effect under the introductory words in s. 88. Clause 1 of the agreement modified sub-s. 14 of s. 88 by altering the portion of the river Mersey which the canal company were bound to dredge and maintain dredged, and it contained various other provisions modifying the rights conferred by s. 88 upon the traders as well

as upon the corporation; and clause 10 was as follows: [His Lordship read it, and continued:—] I may remark in passing that this arbitration clause differs from the arbitration clause in s. 88 of the Act of 1885, the appointment of the arbitrator resting with the president of the Institution of Civil Engineers, and not with the Board of Trade. Sect. 43 of the Act of 1896 was as follows: [His Lordship read it, and continued:—]

Now it is necessary to consider the case of the corporation separately from the case of the traders. I cannot regard s. 88, either in its original form or as modified by the Act of 1896, as a mere agreement between the corporation and the canal company. I think it was an enactment dealing with, and conferring rights upon, not the whole public, but a particular class of the public, namely, manufacturers, traders, and others in or near Warrington; and this being so, it seems to me that s. 88 must be taken to have conferred rights to be dealt with and enforced only in the manner prescribed by sub-s. 22; or, in other words, I think that sub-section excludes the jurisdiction of the Court in any case of difference between the corporation and the canal company falling within the language of the sub-section: see *Caledonian Ry. Co.* v. *Greenock and Wemyss Bay Ry. Co.* (1) The authorities which have decided that under the Building Society Acts and the Friendly Society Acts the jurisdiction of the Courts is ousted may be referred to as illustrating the general principle: see especially *Crisp* v. *Bunbury* (2) and *Municipal Permanent Investment Building Society* v. *Kent.* (3) In my view, the position is not changed by reason of the Act of 1896. The scheduled agreement confirmed by the Act must either be regarded as something to be read into, and to form part of, s. 88, or as something more than a mere agreement between the parties, and as in substance a public enactment affecting not merely the parties, but traders and others. I agree, therefore, with my Lord and Stirling L.J. that the objection, so far as the corporation is concerned, is valid.

(1) L. R. 2 H. L., Sc. 347. (2) 8 Bing. 394; 34 R. R. 747.
(3) (1884) 9 App. Cas. 260.

C. A.
1904
JOSEPH CROSFIELD & SONS, LIMITED
v.
MANCHESTER SHIP CANAL COMPANY.
Cozens-Hardy L.J.

With reference to the traders, different considerations apply. Neither of the two arbitration clauses referred to in terms affects the traders; each relates only to differences between the corporation and the company. It is quite true that in a certain sense the corporation might be said to represent the traders for the purpose of obtaining from the arbitrator a declaration of right; yet it is difficult to see how either of these arbitration clauses can be applied to the case of individual traders, each of whom alleges that he has sustained damage by reason of the breach by the canal company of its statutory obligations. No trader could be a party to such an arbitration, or require such an arbitration to be entered upon. The introductory words of s. 88 suffice to shew that it was intended to confer certain rights upon the traders for whose benefit the section was enacted; and, even apart from that, there is sufficient in the section itself to entitle the traders to maintain an action for damages unless there is some other provision in the Act expressly excluding the jurisdiction of the High Court: *Davis & Sons* v. *Taff Vale Ry. Co.* (1) It seems to me wrong to postpone the adjudication upon the claims of the traders until after an award in a reference to which they will not be parties. I agree with Stirling L.J. on this point.

It is suggested, however, that s. 202 of the Act of 1885 has the effect of ousting or postponing the jurisdiction of the Court. The section is as follows: [His Lordship read it, and continued:—] I may remark in passing that this arbitration clause differs from both of the other arbitration clauses I have read. No importance was attached to this section in the argument in the Court below, but it is nevertheless open to the appellants to contend that the jurisdiction of the Court is excluded by it. I am not able to attribute such force to the section. Even if, which may be doubted, it has any application to a claim for damages of the nature I have indicated, I think it is, at the most, only a clause enabling either party to apply to the Court to stay the proceedings and to refer to arbitration, and is not a clause excluding the jurisdiction of the Court: *London Chatham and Dover Ry. Co.* v. *South Eastern Ry. Co.* (2) I

(1) [1895] A. C. 542.
(2) 40 Ch. D. 100.

cannot conclude that the jurisdiction of the Court is ousted for all time, in every case of dispute between the canal company and members of the public with reference to the statutory obligations imposed on the canal company towards those members of the public. These obligations are both numerous and varied. They extend over nearly 100 sections. It may be that s. 202 only prescribes a mode of arbitration for those cases in which, in the earlier part of the Act, arbitration is prescribed but no particular mode of arbitration is specified. But however that may be, I do not find myself able to agree with the view of the majority of the Court that it is not competent to us at the present moment to consider the case presented by the traders.

The result, in my opinion, is that the objection prevails as to the corporation, but not as to the traders, and the strict course would be to strike out the corporation as co-plaintiffs, and to leave the other co-plaintiffs to continue the action. But, although no relief could be given to the corporation in this action, the misjoinder is not very material, for the questions arising for decision as between the traders and the canal company involve or include the questions sought to be raised as between the corporation and the canal company; and under these circumstances, in my view, we ought now to deal with the merits of the appeal.

VAUGHAN WILLIAMS L.J. The result is that the action, so far as it is an action by the corporation, must be dismissed; and so far as it is an action by the traders, whether collectively or individually, it must be stayed until further order. As to the costs, the defendants, the appellants, will not have any costs of the action prior to their taking the point of ouster of jurisdiction; but their subsequent costs of the action must be paid by the plaintiffs, and the plaintiffs must also pay the costs of this appeal.

Solicitors: *Grundy, Kershaw, Samson & Co., London and Manchester; Burton, Yeates & Hart, for A. Wilson & Cowie, Liverpool.*

G. I. F. C.

C. A.
1904
KEKEWICH J.
March 16, 24.
C. A.
May 31; *June* 1.

In re LONGBOTHAM & SONS.

Solicitor and Client—Costs—Taxation—Taxation by Third Party—Taxation of Bill of Mortgagee's Solicitor on application of Mortgagor—Solicitors Act, 1843 (6 & 7 *Vict. c.* 73), *s.* 38.

On the taxation, under the third-party section (s. 38) of the Solicitors Act, 1843, of the bill of a mortgagee's solicitor at the instance of the mortgagor, items which the mortgagor would not be liable to pay as between himself and the mortgagee must be disallowed, even though the solicitor would be entitled to charge them as against his client, the mortgagee.

In re Gray, [1901] 1 Ch. 239, approved and adopted.

SUMMONS by the solicitors of a mortgagee to review the taxation of their bill of costs. An order for the taxation of the bill had been made on the application of the mortgagor.

In taxing the bill the master disallowed items which, though the mortgagee's solicitors would have been entitled to charge them as against the mortgagee, the mortgagee would not have been entitled to charge as against the mortgagor.

The solicitors objected that this was a wrong method of taxation, and that the taxation should have proceeded in exactly the same way as if it had taken place on the application of the mortgagee himself.

In his answers to objections the master said: "I have taxed the bill on the principles laid down in *In re Gray* (1), and I think all the points raised by the respondents are really governed by this statement. . . . .

"The bill was made out on a wrong principle, the old practice being present to the minds of both the solicitor and his London agent, and consequently more than one-sixth has been disallowed. If the present practice had been followed and the bill drawn accordingly, I am satisfied there would have been no question raised, as the bill does not contain overcharges, except in one instance and that a small one, but it is sought to charge the mortgagor with more than he is liable to pay as between him and the mortgagee, and such bills are of very frequent occurrence."

(1) [1901] 1 Ch. 239.

In order to ascertain the practice in the Taxing Office Kekewich J. referred the matter to the taxing masters, and the following certificate was given by the senior master:—

"Your Lordship having desired a certificate from the masters of the Supreme Court (Taxing Office) of the practice generally in cases between mortgagor and the solicitor of the mortgagee, I beg respectfully to report to your Lordship.

"That the practice followed by the masters in taxations under s. 38 of 6 & 7 Vict. c. 73 (the Solicitors Act), up to within recent years was to tax as between the solicitor and the client (the party chargeable in the first instance), and not as between the solicitor and the party liable to pay, effect, however, being given, as far as possible, to the cases of *In re Negus* (1) and *In re Abbott* (2), and the observations of Cotton L.J. in *In re Morecroft.* (3)

"The principles, however, laid down by these cases were, in the opinion of the masters, considerably extended by the case of *In re Gray* (4), and since that case the practice in the Taxing Office in taxations under this section has been to tax, apart from the order, as between the solicitor and the party or estate liable to pay."

The summons came on for hearing before Kekewich J. on March 16, 1904.

George Lawrence, for the solicitors.

T. L. Wilkinson, for the mortgagor, was not called upon.

KEKEWICH J. It was contended on behalf of the mortgagee's solicitors that the taxation of their bill of costs by the mortgagor must proceed according to the rules which would govern a taxation of the same bill by the mortgagee, the direct client of the solicitors. That seems on the face of it a rather useless dealing with a bill of costs, because a mortgagor, in ordinary circumstances, does not care to know what the liability of the mortgagee to his solicitor is, but desires to know what his own liability is to the mortgagee's solicitor, that is, to the mortgagee through his solicitor. He wishes to know what he has to pay

(1) [1895] 1 Ch. 73.
(2) (1861) 4 L. T. 576.
(3) (1885) 29 Sol. J. 471.
(4) [1901] 1 Ch. 239.

C. A. 1904 LONGBOTHAM & SONS, *In re.* Kekewich J.

for principal, interest, and costs, and to ascertain what is to be charged against him; and it is of very little advantage to him to know what may be charged by the solicitor against the mortgagee, some part of which may not be chargeable against himself. But the cases which have been decided on the construction of s. 38 clearly went upon this—that the taxation must proceed as between solicitor and client, that is to say, as between the mortgagee and his solicitor. Mr. Lawrence has selected some of the best for his clients. But there is a recent decision of Cozens-Hardy J. in *In re Gray* (1), which, though it does not purport to overrule the older cases, did certainly direct taxation on an entirely different footing, and, as it seems to me, a useful footing. I could not take upon myself to say that the construction of the Act adopted by Lord Langdale M.R. and Lord Romilly M.R. was wrong. But Cozens-Hardy J. has come to a direct conclusion on the subject; and that being so, after hearing Mr. Lawrence and before hearing Mr. Wilkinson, I thought it was desirable, both for my own assistance and the instruction of the profession, to obtain a certificate from the taxing masters. [His Lordship read the certificate, which is above stated, and continued:—] So that I have now the practice of the office certified in that way, and I have also a statement by the taxing master that he has taxed this bill according to the principle of *In re Gray*. (1) I cannot disturb the certificate, but I give leave to appeal.

C. C. M. D.

C. A.

The solicitors appealed. The appeal came on for hearing on May 31, 1904.

George Lawrence, for the solicitors. It is submitted that a taxation at the instance of a third party under s. 38 of the Solicitors Act, 1843, ought to proceed exactly in the same way as if it had been a taxation between the solicitor and his own client, the person primarily chargeable with the bill. That is, all the items which the solicitor is entitled to charge as against his own client, the mortgagee, in connection with the mortgage transaction, ought to be allowed on taxation as

(1) [1901] 1 Ch. 239.

against the mortgagor, even though, as between the mortgagor and the mortgagee, the mortgagor is not liable to pay them. If on the taxation the mortgagor is charged with any items which as between himself and the mortgagee he is not liable to pay, the matter can be set right in the account between mortgagor and mortgagee.

It is contended that a taxation in this way is in accordance with s. 38 of the Solicitors Act, 1843, which says that in a taxation on the application of a third party "the same reference and order shall be made thereupon, and the same course pursued in all respects, as if such application was made by the party so chargeable with such bill as aforesaid." And it is in accordance with the practice of the taxing masters for a long series of years after the passing of the Solicitors Act, 1843: *In re Wells* (1); *In re Jones* (2); *In re Fyson* (3); *In re Bignold* (4); *In re Barrow* (5); *In re Taylor* (6); *In re Baker* (7); *In re Massey* (8); *In re Abbott* (9); *In re Newman.* (10)

[VAUGHAN WILLIAMS L.J. referred to *In re Bignold.* (11)]

In re Morecroft. (12)

[VAUGHAN WILLIAMS L.J. In that case the liability of the third party to pay was defined by agreement. What difference can it make whether the liability is defined by agreement or by law?]

In re Holliday and Godlee. (13)

[ROMER L.J. Suppose a client with his eyes open had chosen to pay the solicitors' bill, then, if your contention is well founded, there could not be a taxation at the instance of a third party.]

So far all the cases are in favour of the solicitors. The cases which appear to be to the contrary are all really founded upon *In re Brown.* (14) But in that case the taxation must really

(1) (1845) 8 Beav. 416; 68 R. R. 132.
(2) (1845) 8 Beav. 479, 480, 481; 68 R. R. 160.
(3) (1846) 9 Beav. 117, 119.
(4) (1845) 9 Beav. 269.
(5) (1853) 17 Beav. 547.
(6) (1854) 18 Beav. 165.
(7) (1863) 32 Beav. 526.
(8) (1865) 34 Beav. 463; 34 L. J. (Ch.) 492.
(9) 4 L. T. 576.
(10) (1867) L. R. 2 Ch. 707.
(11) 9 Beav. 271.
(12) 29 Sol. J. 471.
(13) (1888) 58 L. T. 301.
(14) (1867) L. R. 4 Eq. 464.

C. A. 1904 LONGBOTHAM & SONS, *In re.*

have been under s. 39 of the Solicitors Act, 1843, though the report states that it was under s. 38. The taxation was of the bill of the solicitor of a trustee, and was ordered on the application of a cestui que trust. The words of s. 39 differ from those of s. 38. And *In re Brown* (1) is inconsistent with what was said by Turner L.J. in *In re Dickson.* (2) It is shewn by *Brown* v. *Burdett* (3) that the amount of costs allowed on taxation as between a client and his solicitor is not conclusive of the amount which the Court will allow out of an estate in an administration action. The observations of Chitty J. in *In re Negus* (4) were founded on a misapprehension of *In re Brown.* (1) The only case which is really adverse to the solicitors is the case on which the taxing master relied: *In re Gray* (5), a decision of Cozens-Hardy J., which may be said to have revolutionized the practice in the Taxing Office. It is submitted that the old practice was in accordance with the terms of s. 38. And that is the view taken by the text-writers: vide Cordery on Solicitors, 3rd ed. p. 326; Daniell's Chancery Practice, 7th ed. p. 1728; Fisher on Mortgage, 5th ed. p. 911; Morgan and Wurtzburg on Costs, 2nd ed. pp. 460, 461.

T. L. Wilkinson, for the mortgagor, was not called upon.

June 1. ROMER L.J. read the following judgment:—I will first deal with this case on principle.

When a third party taxes a bill under s. 38 of the Act of 1843, it is clear, both from the wording of the section itself and the authorities, that the taxation must be on the footing of a taxation between the solicitor and the client. But the third party is not for all purposes in connection with the taxation to be treated as if he were himself the client. For instance, when the client has paid the bill, and might not be able to shew special circumstances sufficient to entitle him to have the bill taxed, it does not follow of necessity that the third party is thereby precluded from obtaining taxation. The proviso at the end of s. 38 shews that. And in my opinion that proviso is important and useful, and a Court will doubtless

(1) L. R. 4 Eq. 464.
(2) (1856) 8 D. M. & G. 655, 660.
(3) (1888) 40 Ch. D. 244, 253.
(4) [1895] 1 Ch. 73, 80.
(5) [1901] 1 Ch. 239.

act upon it in cases where justice requires that the third party should not be bound by what has taken place between the solicitor and the client. Again, the solicitor may have acted for the client in more than one completed matter, and the client may not be entitled as against the solicitor to obtain delivery of a bill and taxation, except on the footing of having all the matters included and taxed. But if the third party be only interested in and liable to pay the costs of one matter, it is clear in my opinion, as a matter of principle, that under s. 38 he can obtain taxation of the bill so far as concerns that one matter only, and on the footing of being liable to pay only the taxed costs of that matter. And that principle really decides this case, and shews that the appeal should fail. For in the present case the third party is a mortgagor, and he is only interested in the relations between the solicitor and his client so far as they concern the position of the client strictly in his character of mortgagee. The mortgagor, therefore, is entitled under s. 38 to have taxation of the solicitors' bill limited to the items of costs incurred by the client strictly in his position of mortgagee. And it is on that principle that the taxing master has proceeded. It may well be that the client, as between himself and the solicitor, is liable for costs incurred in relation to the mortgaged property with which the mortgagor is not concerned, and for which the mortgagor is not liable. Those will be costs incurred by the mortgagee in his personal capacity so far as concerns the mortgagor, and not costs incurred by him in the capacity of mortgagee strictly and properly considered, and accordingly would not have to be taxed or considered by the taxing master in a taxation by the mortgagor as third party. And I may add, though it may not be necessary to do so for the purposes of the present case, that if the mortgagee chose to sanction a charge by his solicitor beyond what he and the solicitor knew or must be taken to have known could be properly charged as against the mortgagor, though the mortgagee might be bound for the excess by reason of his sanction, the mortgagor would not be bound, for the sanction by the mortgagee would be held as given by him in his personal capacity and not in his capacity of mortgagee.

C. A. 1904 LONGBOTHAM & SONS, *In re.* Romer L.J.

With regard to the authorities, they are so numerous that I do not pretend to say that all the observations by the various judges who decided them can be reconciled. But the principle on which this judgment is based is not in my opinion contrary to any express decision that has been cited. And that principle has been recognised, and I think rightly so, in *In re Brown* (1), *In re Morecroft* (2) (and in particular the judgment of Lindley L.J. in that case), *In re Negus* (3), and *In re Gray* (4), and by the observations of Turner L.J. in *In re Dickson.* (5) And I do not think it will serve any useful purpose to go through the cases cited seriatim. The appeal should, in my opinion, be dismissed with costs.

VAUGHAN WILLIAMS L.J. I concur, but I wish to add one or two observations. In the first place, I assent entirely to every word of the judgment which has just been read by my brother Romer, in so far as it deals with the question which relates to matters which do not, strictly speaking, concern the mortgagor, and which involves costs incurred by the mortgagee otherwise than as mortgagee strictly speaking. I mean by that such costs as are outside the costs for which the mortgagor would be liable. As far as I am concerned, I do not wish to go beyond that. It seems to me that when we go that length we are only affirming the judgment of Chitty J. in *In re Negus* (3), and the judgment of Cozens-Hardy J. in *In re Gray.* (4) In each of those cases there were costs incurred in respect of matters which did not concern the mortgagor and which were costs incurred by the mortgagee, not as mortgagee, but in his personal capacity. I think that all that is necessary for us to do in our present judgment is to affirm the principle of those two decisions, which, as my brother Romer has pointed out, were really anticipated by the decision of Lord Romilly M.R. in *In re Brown.* (1) There is one passage at the end of the judgment of my brother Cozens-Hardy in *In re Gray* (4) which I think very happily expresses all that is necessary to say in this case. He said (6): "The

(1) L. R. 4 Eq. 464.
(2) 29 Sol. J. 471.
(3) [1895] 1 Ch. 73.
(4) [1901] 1 Ch. 239.
(5) 8 D. M. & G. 655, 661.
(6) [1901] 1 Ch. 248.

governing idea of Chitty J.'s judgment is that even on a third party taxation the Court is bound to look at the nature of the items and to consider whether, apart from the order, the applicant is under any liability to pay them. In other words, although the solicitor may put in one bill as against his own client a series of items, some of which may go beyond the liability of the third party, the third party does not by obtaining an order to tax render himself liable to the whole bill. With respect to matters falling within his liability under a contract express or implied, he cannot dispute the amount properly payable as between the solicitor and his own client, but in other respects his liability is not increased by obtaining a third party order to tax." I wish further to add that I do not think that in any of the cases it has been forgotten that what is authorized on behalf of the third party by s. 38 of the Solicitors Act, 1843, is a taxation obtained by the third party against the solicitor. What I mean is that that proceeding which is sanctioned by s. 38 is a wholly different proceeding from that which is described by Lord Romilly M.R. in *In re Massey*. (1) There Lord Romilly, refusing to order the taxation of a bill at the instance of a Mr. Waters as third party, expressed his opinion that the bill might be reviewed in a proper proceeding as between the applicant and the clients, and he said this: "In other words, in my opinion, a bill from Mr. Massey" (the solicitor) "would have to be submitted to be moderated by the taxing master, and the amount at which the taxing master would fix it would be all that Mr. Waters would be required to pay the directors," i.e., the clients. That proceeding of moderating is not the proceeding authorized or intended to be authorized by s. 38.

COZENS-HARDY L.J. As this is in substance, though not in form, an appeal against my own decision in *In re Gray* (2), I will content myself by saying that I agree.

Solicitors: *Bower, Cotton & Bower, for Longbotham & Sons, Halifax; Indermaur & Brown, for Pearce, Todmorden.*

(1) 34 Beav. 463, 467; 34 L. J. (Ch.) 492, 495. (2) [1901] 1 Ch. 239.

W. L. C.

C. A.
1904
June 1.

In re ATKINSON.
BARBERS' COMPANY *v.* GROSE-SMITH.

[1892 A. 396.]

Tenant for Life and Remainderman—Capital and Income—Apportionment—Loss—Settled Fund—Authorized Investment—Mortgage—Deficient Security.

Where a fund is settled upon tenant for life and remaindermen, and is invested in accordance with the powers of the settlement upon a mortgage which proves to be insufficient for the payment of principal and interest in full, the sum realized by the security ought to be apportioned between the tenant for life and the remaindermen in the proportion which the amount due for arrears of interest bears to the amount due in respect of the capital debt.

In re Moore, (1885) 54 L. J. (Ch.) 432, and *In re Alston*, [1901] 2 Ch. 584, followed.

In re Foster, (1890) 45 Ch. D. 629, and *In re Phillimore*, [1903] 1 Ch. 942, overruled.

Decision of Kekewich J. affirmed.

THIS was an appeal from a decision of Kekewich J.

John Atkinson by his will dated August 30, 1858, gave his residuary estate upon trust for conversion and investment, and upon further trust, subject to certain interests which had since determined, to pay the income to his eleven nephews and nieces for life, and the survivors and survivor of them, and, after the decease of the survivor, upon trust to pay the capital to the Barbers' Company to be held by them upon certain charitable trusts.

The testator died on November 8, 1861.

In January, 1864, part of the residuary estate was invested under the powers of the will in a mortgage of three farms in Essex for £29,000 and interest at 5 per cent., reducible to 4 per cent. on punctual payment. In January, 1889, the interest on this mortgage began to fall into arrear; and in May, 1889, the trustees entered into possession. Since that time the rents arising from the mortgaged property had been paid to the tenants for life, but they were insufficient to keep down the interest, and it was apprehended that the property when sold

would not realize sufficient to pay the principal moneys and arrears of interest in full.

In March, 1892, this action was commenced by originating summons by the Barbers' Company against the then trustees of the testator's will and the then tenants for life for the purpose of determining whether the mortgaged property ought not to be realized; and by an order made on June 2, 1892, the Court ordered the trusts of the will of the testator to be carried into execution, and directed an inquiry whether any and what proceedings should be taken to realize, among other securities, this mortgage. In answer to this inquiry the chief clerk in 1894 certified that this mortgage ought not to be realized. In April, 1898, one of the three farms, called "Clement's Hall Farm," was sold in pursuance of an order made in this action on February 4, 1898, and it produced the sum of 4600*l.* odd. In 1903 the tenants for life took out a summons in this action asking that the 4600*l.*, and also the proceeds of sale of the two remaining farms when sold, might be apportioned between the tenants for life for the time being of the residuary estate and the trustees of the will, as representing the capital, in proportion to the amount due in respect of arrears of interest and the amount of capital remaining due on the mortgage, and asking further that directions might be given for the realization of the remaining farms. At the date of this application the amount due for capital on this security was about 22,000*l.*, and the amount due for arrears of interest about 9000*l.* Kekewich J. ordered an immediate sale of the remaining farms, and ordered further that the 4600*l.* should be apportioned between the tenants for life and the capital in the proportion which the amount of interest in arrear at 5 per cent. bore to the amount of principal due under the mortgage. The learned judge said that he adhered to his former decision in *In re Alston* (1), where he had fully discussed the question, and that he was fortified in his opinion by the recent decision of the Master of the Rolls of Ireland in *Stewart* v. *Kingsale.* (2) It was true that it was not known whether the security would ultimately prove insufficient, because the whole of the property had not yet been realized;

(1) [1901] 2 Ch. 584. (2) [1902] 1 I. R. 496.

C. A. 1904 ATKINSON, *In re.* BARBERS' COMPANY *v.* GROSE-SMITH.

but, in his Lordship's opinion, that was no reason for refusing to distribute the proceeds of the part which had been sold. Applying *In re Alston* (1) he had to find what at the date of the judgment was due to the tenants for life for interest, and what was due to the remaindermen for capital, and to distribute the proceeds between the two in the proportions which those two sums bore to one another.

The Barbers' Company appealed from this decision so far as it related to the apportionment.

T. H. Carson, K.C., and *A. J. Spencer*, for the Barbers' Company. The question is as to the apportionment, as between tenant for life and remainderman, of a loss arising from a deficient security. Two principles are stated in the books. One is that stated by Kay J. in *In re Foster*. (2) That principle is to add the moneys received by the tenant for life by way of interest from the security to the proceeds of sale, and treat the total as the sum recovered from the mortgage; then ascertain how much at the date of the sale would have come to the tenant for life and how much to the corpus, assuming that there had been no deficiency, and divide the total between the tenant for life and the remaindermen in the proportion of those two amounts. The other principle is that adopted by Kekewich J. in *In re Alston* (1), and followed by him in this case. That principle is simply to divide the proceeds in the proportion which the amount of interest in arrear bears to the amount of principal due under the security. That principle was first enunciated by Pearson J. in *In re Moore* (3), and it has since been followed in Ireland in the recent case of *Stewart* v. *Kingsale*. (4) It is submitted that the former principle is the right one, and that in apportioning the loss the tenant for life is bound to bring into hotchpot, so to speak, the sums received for interest. The other principle works a great hardship upon the remaindermen. As stated by James V.-C. in *Cox* v. *Cox* (5), the true principle in all these cases is that

(1) [1901] 2 Ch. 584.
(2) 45 Ch. D. 629.
(3) 54 L. J. (Ch.) 432.
(4) [1902] 1 I. R. 496.
(5) (1869) L. R. 8 Eq. 343.

neither the tenant for life nor the remainderman is to gain an advantage over the other. The two must share the loss in the same way as they would have shared it had it occurred when they first became entitled in possession to the fund; and see *Turner* v. *Newport* (1) and *In re Bird.* (2)

[ROMER L.J. Those are cases of unauthorized investments, to which a different principle applies.]

We do not ask here that the tenants for life shall bring into account everything received by them from the date of the mortgage, but only the amounts received from the time when this security was first suspected to be deficient, i.e., from 1889: *In re Phillimore.* (3) Subject to that modification in the date, Swinfen Eady J. there proceeds on the principle of *In re Foster.* (4) *In re Moore* (5), however, appears to have been followed in two cases which are not fully reported: *In re Barker* (6) and *Lyon* v. *Mitchell.* (7) In the former case Stirling J. seeks to distinguish *In re Foster* (4) on the ground that the apportionment there was intended to be confined to the case of a mortgagee in possession. It is difficult to understand that distinction; but, assuming it to be sound, this is a case of mortgagee in possession, and is therefore within the principle of *In re Foster.* (4) Further, no apportionment is possible until the whole estate is realized, because until that event happens non constat that the security will prove deficient. Lastly, assuming that we are wrong on both these points, we say that, even if the principle of *In re Moore* (5) is adopted, the date at which the apportionment is to be made is the date of the realization, and not, as Kekewich J. stated, the date of the judgment.

[ROMER L.J. That was quite right in this case, because this was a provisional apportionment only.]

S. Dickinson, for two of the trustees of the will.

P. O. Lawrence, K.C., and *Lyttelton Chubb*, for all but one of the tenants for life.

(1) (1846) 2 Ph. 14.
(2) [1901] 1 Ch. 916.
(3) [1903] 1 Ch. 942.
(4) 45 Ch. D. 629.
(5) 54 L. J. (Ch.) 432.
(6) [1897] W. N. 154 (14).
(7) [1899] W. N. 27 (6).

C. A. 1904

ATKINSON, *In re.* BARBERS' COMPANY *v.* GROSE-SMITH.

Vaughan Hawkins, for the remaining tenant for life, who was also a trustee.

VAUGHAN WILLIAMS L.J. I think that this appeal fails. I think that the judgment of Kekewich J. in this case and also his judgment in *In re Alston* (1) were quite right. In this case there was an authorized investment, a mortgage, and that investment was a security for capital and interest at the rate of 5 per cent., and for a long time the security was sufficient and the interest was paid. Then presently the security began to be deficient; there was not enough to keep up the full payment of the interest, and there was a grave probability that the security might not be sufficient to provide payment of the capital. Under these circumstances a portion of the security was realized, and that produced 4600*l*. A question has arisen about apportioning this amount. Strictly speaking, one cannot make a final adjustment now, because it is impossible at present to ascertain all the factors which are necessary for this adjustment. One does not know at present what the unsold residue of the estate may realize, but it is said that it will be a convenient thing, although the time for final adjustment has not come and the conditions are not present which would enable one to make that final adjustment, that we should declare now what will be the principle of the final adjustment, in order that for the benefit of all parties this sum that has been realized may be provisionally apportioned. That, of course, will be without prejudice to such further adjustment as may be ultimately necessary when all the factors have been ascertained. So far as I can judge from Kekewich J.'s judgment, I do not think that he meant to do anything more than make a provisional apportionment. That being the case, one has to deal with the question of what is the right principle of apportionment or adjustment. Now in the Irish case of *Stewart* v. *Kingsale* (2) Porter M.R. said that he had to choose there between *In re Foster* (3) and *In re Moore* (4), and he said he preferred the principle laid down in *In re Moore*. (4) I say,

(1) [1901] 2 Ch. 584.
(2) [1902] 1 I. R. 496.
(3) 45 Ch. D. 629.
(4) 54 L. J. (Ch.) 432.

as he did, that I prefer that principle; and really the Master of the Rolls gives such clear and forcible reasons in his judgment for his preference, that I feel that I could not better them in any way by anything that I may add to them. In only one respect do I at all criticize what the Master of the Rolls said. I do not think that the question whether *In re Foster* (1) or *In re Moore* (2) laid down the right principle of apportionment was quite as open a question according to the English cases as the Master of the Rolls assumed, because *In re Foster* (1) is a case which, as Mr. Carson told us, has never been followed, and, as he also practically had to admit, has never been preceded. I mean by that that there never was before the decision in *In re Foster* (1) a case in which the principles which would support that decision were in the slightest degree indicated. Looking at the judgment of Kay J., and considering it with the greatest care in view of his great learning as a judge, I observe that in refusing to follow *In re Moore* (2) he gives no reasons why he disapproved of Pearson J.'s decision, or why he preferred the calculation which he then made. I say, therefore, that I prefer *In re Moore*. (2) Now what is the principle of that decision? Let me say first that we are not dealing here with a case of unauthorized investment. Several cases were cited to us of unauthorized investments, but I do not trouble myself with those cases, because I think they have no bearing on this case whatsoever. We have here a case of an authorized investment, a mortgage, settled on a tenant for life and remaindermen. This security being an authorized investment, and being a security both for principal and for interest at the rate of 5 per cent., what is to be done in a case where for a considerable time that interest has been paid, and then the security is realized and proves insufficient? What was it a security for? It was a security equally for the principal and the interest. I will venture to enunciate, not a calculation, but a principle here which one ought to apply in these cases, and that principle is, that there being a security for principal and interest, and there having been a loss, one must take care that there is rateable equality in the incidence

(1) 45 Ch. D. 629. (2) 54 L. J. (Ch.) 432.

C. A. 1904 ATKINSON, *In re.* BARBERS' COMPANY *v.* GROSE-SMITH. Vaughan Williams L.J.

of that loss. Now I proceed to make the calculation which follows upon that principle, and I will take the very words of *In re Moore* (1): "The apportionment of [the sum to be dealt with] will be in the proportions which [the amount due for capital] and [the amount due to the tenant for life for arrears of interest] bear to one another." The result will be that the appeal fails; but we will preface the order by such words as may be necessary by way of precaution to prevent it being supposed that this is a final apportionment.

ROMER L.J. I am of the same opinion. I must say that, but for the cases of *In re Foster* (2) and *In re Phillimore* (3), I should have thought the principle to be applied in a case like the present was quite clear. The question may be shortly stated as follows. There is a mortgage—an authorized security. It is settled by a settlement upon a tenant for life, and then upon remaindermen. Interest is paid on the mortgage debt for some time in full; then the interest falls into arrear, and, after there are some arrears outstanding and due, the security has to be realized, and it turns out that there is not sufficient to pay the arrears of interest and the capital debt. What is to be done under the circumstances? I should have thought that the way to proceed was clear. In the first place, as to the interest which was paid to the tenant for life, it is clear that the tenant for life was entitled to receive it and to retain it, and that the remaindermen could have no possible claim or equity against the tenant for life in respect of the sums so received in any point of view whatever. That being so, what is the relative position of the tenant for life and the remaindermen so far as concerns the property which remains as security for the debt? They are simply in the position of two persons who have one security for the two debts belonging to them respectively. Notwithstanding the payment of interest to the tenant for life, so far as concerns his arrears of interest the tenant for life has a right as against the remaindermen to have those arrears charged upon the

(1) 54 L. J. (Ch.) 432, 434. (2) 45 Ch. D. 629.
(3) [1903] 1 Ch. 942.

security. The security is a security, not only for principal, but for interest, and that is the right which the tenant for life had against the security and against the remaindermen, and I fail to see any equity on the part of the remaindermen which would enable them to challenge that right. Then, when the security is insufficient to pay the two debts charged upon it, I should have thought it would follow as a matter of clear right that the tenant for life could say to the remaindermen, "Apportion our security, which is a security for my debt as well as yours, between us in proportion to the amount of the debts, in the same way as you would if you had a mortgage given for two separate debts and the security proved insufficient. You would apportion the insufficient proceeds between the two mortgage debts." That, on principle, ends the case. About the authorities let me say a few words. *Turner* v. *Newport* (1), *Cox* v. *Cox* (2), and *In re Bird* (3) are all authorities dealing with cases of unauthorized investment, and have no application to such a case as we have to deal with here. In dealing with cases of unauthorized investment, from the very nature of the transaction one has to consider the rights of the parties at the time when the investment was made. Almost of necessity one must go back and adjust the rights as they stood at that time. Those cases, in my opinion, have no real bearing upon the case which we have to decide. The question which we have here to determine had to be considered in *In re Moore* (4), and there it received, to my mind, proper and sufficient treatment. The principle I have stated was carried out, and rightly carried out, in that case, as indeed it was also in *Lyon* v. *Mitchell* (5), *In re Barker* (6), *In re Alston* (7), and *Stewart* v. *Kingsale.* (8) The only authorities which cause the slightest trouble are *In re Foster* (9) and *In re Phillimore.* (10) As my Lord has pointed out, *In re Foster* (9) had no previous authority to justify it; and, speaking

(1) 2 Ph. 14.
(2) L. R. 8 Eq. 343.
(3) [1901] 1 Ch. 916.
(4) 54 L. J. (Ch.) 432.
(5) [1899] W. N. 27 (6).
(6) [1897] W. N. 154 (14).
(7) [1901] 2 Ch. 584.
(8) [1902] 1 I. R. 496.
(9) 45 Ch. D. 629.
(10) [1903] 1 Ch. 942.

C. A. 1904 ATKINSON, *In re.* BARBERS' COMPANY *v.* GROSE-SMITH. Romer L.J.

with great respect of the very learned judge who decided it, I think that the decision in that case was wrong. The learned judge there appears to have arrived at a method of apportionment which, so far as I can see, was not suggested in argument and was not authorized by any previous authority, and he gave no reasons for adopting that method. He states no principle on which he purported to proceed, and that case has never been followed. It was not followed even by Swinfen Eady J. in *In re Phillimore* (1), and other judges have expressly declined to follow it, as, for example, North J. in *Lyon* v. *Mitchell* (2), and Stirling J. in *In re Barker.* (3) With regard to *In re Phillimore* (1) I need only say this—that I think Swinfen Eady J. was misled by the form which the argument took before him or failed to appreciate the argument. The real point of principle on which that case ought to have been decided, in my opinion, appears to have escaped the attention of the learned judge. He appears to have believed that the whole question he had to decide was one as to the point of time from which the account should be taken as against the tenant for life in respect of the income which he had received, and which was to be brought in by him into a sort of hotchpot in order to carry out the appointment. As it was, he declined to follow *In re Foster* (4); but, for the reasons which I have given, *In re Phillimore* (1) is really no authority upon the question which we have here. So far as it really proceeded on a different basis from that which I have indicated as the correct basis, in my opinion it was wrongly decided. Those are the only two cases which in any way conflict with the principle I have stated. To my mind that is a perfectly clear and intelligible principle, and one which ought to be applied without any difficulty. I will only add that we are really deciding a hypothetical question; but we are led to do so by the advisability, if not the necessity, of allowing some interim division, some provisional apportionment, to be made of this 4600*l.* between the tenant for life and the remaindermen. I think that that justifies the Court in

(1) [1903] 1 Ch. 942.
(2) [1899] W. N. 27 (6).
(3) [1897] W. N. 154 (14).
(4) 45 Ch. D. 629.

deciding the question at this stage. The order which was made by Kekewich J. as to the apportionment of the 4600*l.* ought to be prefaced by a statement in the form suggested to us by my brother Cozens-Hardy, to the effect that the apportionment of that sum is to be without prejudice to a final adjustment when the estate is perfectly realized. It is not until the estate is finally realized that there can be any proper adjustment of the rights of the parties. This 4600*l.*, for example, cannot be treated as representing any specific portion of the original mortgage, and for that reason, amongst others, it is impossible at the present time to have a complete and final adjustment of that sum. Therefore the division of the 4600*l.* can only be treated as provisional, and the final adjustment must take place when the estate is fully realized. There will be then ample time to apply for the taking of such accounts as may be necessary to finally adjust the rights of the parties on the principle above stated.

COZENS-HARDY L.J. I am of the same opinion, and have very little to add after the judgments given by my Lord and Romer L.J. I think that the true way to approach this question is to treat it as though the whole security had been realized and had produced a certain sum. What would then be the inquiry which the Court would have to make? What was due on the security at the time of realization? The answer would be that the capital and the arrears of interest, and no more, were due. It would be idle to say that the interest which had been paid wholly or in part to the tenant for life was then due upon the security of the land, or upon the proceeds of the sale of the land. The only charge would be for those two sums—capital and arrears of interest. On what principle are you to apportion them? Just in the same way as you would if it were a contributory mortgage, part owing to A. and part owing to B. You would apportion it rateably. So here you must adopt the plain, simple, and intelligible rule which was adopted by Pearson J. in the case of *In re Moore*. (1) That principle was followed by Kekewich J. in *In re Alston* (2), and by the Irish

(1) 54 L. J. (Ch.) 432. (2) [1901] 2 Ch. 584.

C. A. 1904 — ATKINSON, *In re.* BARBERS' COMPANY *v.* GROSE-SMITH. — Cozens-Hardy L.J.

Master of the Rolls in his very able judgment in *Stewart* v. *Kingsale* (1), and again by Kekewich J. in his judgment in this case. With the greatest respect to Kay J. and Swinfen Eady J., I cannot consider the decisions in *In re Foster* (2) and *In re Phillimore* (3) as correct. I do not refer to the cases on unauthorized investments, because they stand on an entirely different footing. The appeal will be dismissed, the only variation being that the order must be expressed to be without prejudice to any ultimate adjustment of the rights of the parties upon a complete realization.

Solicitors: *Lingard & Leach; Russell, Son & Cumming; Weir, Ford & Leach.*

H. B. H.

C. A. 1904 — *June* 16, 20.

In re PRETORIA PIETERSBURG RAILWAY COMPANY, LIMITED.

[0092 of 1904.]

Company—Winding-up—Appeal from Registrar—Companies (Winding-up) Rules, 1903, *r.* 7.

An appeal from an order of the registrar in chambers in the winding-up of a company does not lie direct to the Court of Appeal.

The proper course to obtain a reversal of such an order is to move before the judge to discharge it.

APPEAL by the liquidators of the above company from the refusal of Mr. Registrar Hood of an application by them that J. Volker, who had issued an originating summons in the winding-up of the company asking for a declaration that he was entitled to prove as a creditor of the company for 120*l.*, might be ordered to give security for costs, on the ground that he was resident in Holland, out of the jurisdiction.

June 16. *Younger, K.C.*, and *H. C. Bischoff*, for the liquidators.

F. H. M. Corbet, for Volker, objected that leave to appeal had not been given by the registrar.

(1) [1902] 1 I. R. 496. (2) 45 Ch. D. 629.
(3) [1903] 1 Ch. 942.

H. C. Bischoff, who had appeared for the liquidators before the registrar, said that, though leave to appeal had not been given in express terms by the registrar, he intended that there should be an appeal.

VAUGHAN WILLIAMS L.J. We are not satisfied that an appeal lies from the registrar direct to this Court, even if leave is given. We should like to have this point argued first.

Younger, K.C., and *H. C. Bischoff*, for the liquidators. The Court has power to vary its orders from time to time: *Engel* v. *South Metropolitan Brewing and Bottling Co.* (1) In *Strong* v. *Carlyle Press* (2), where a case had been fully argued by counsel before a judge in chambers, the Court of Appeal heard an appeal from his order, though the judge had not certified that he did not require further argument. The present case was fully argued by counsel before the registrar.

In *In re Strand Wood Co.* (3) this Court heard an appeal direct from the registrar, but the objection now suggested does not appear to have been taken. It is understood that in that case Buckley J. declined to entertain an application to discharge the registrar's order, on the ground that the proper course was to go direct to the Court of Appeal. And it is understood that this is the ordinary practice of the learned judge.

The matter is now governed by the Companies (Winding-up) Rules, 1903. (4)

(1) [1892] 1 Ch. 442.

(2) [1893] 1 Ch. 268.

(3) [1904] W. N. 122; [1904] 2 Ch. 1.

(4) Rule 5 provides—(1.) That certain specified matters and applications in the High Court shall be heard before the judge in open Court.

"(2.) Examinations of persons summoned before the High Court under s. 115 of the Companies Act, 1862, shall be held in Court or in chambers as the Court shall direct.

"(3.) Every other matter or application in the High Court under the Acts to which the Rules apply may be heard and determined in chambers."

Rule 6 applies to Courts other than the High Court.

Rule 7: "Subject to the provisions of the Acts and Rules in every Court:—

"(1.) The registrar may under the general or special directions of the judge hear and determine any application or matter which under the Acts and Rules may be heard and determined in chambers.

"(2.) Any matter or application

C. A. 1904

PRETORIA PIETERSBURG RAILWAY COMPANY, LIMITED, *In re.*

Under rule 7, sub-rule 1, the registrar is empowered to "hear and determine" any application which may be heard and determined in chambers, and it is submitted that sub-rule 2 gives power to adjourn to the judge only when the registrar has not heard and determined the matter. Under sub-rule 3 the suitor has no right to an adjournment unless the judge or the registrar thinks fit. This is different from the Chancery practice, under which the suitor has a right to have a matter adjourned from the master for determination by the judge himself. The result, it is submitted, is that the registrar is authorized to determine any matter which can be determined in chambers, unless the judge gives a special direction to the contrary. The registrar is empowered to exercise the jurisdiction of the Court, and there cannot be a motion before him to discharge his own order. Nor can there be such a motion before the judge, because the registrar is empowered to determine the matter.

[ROMER L.J. Even if an order is made by a judge in chambers the proper course is to move before the judge in Court to discharge the order.]

In the present case, if there is not an appeal to this Court, there will be no appeal at all, for the learned judge will not entertain a motion to discharge the registrar's order.

VAUGHAN WILLIAMS L.J. We will not dispose of this point until we have seen Buckley J.

June 20. VAUGHAN WILLIAMS L.J. We have seen Buckley J., and we are of opinion that when a matter has been before the registrar in chambers and he has made an order, whether granting or refusing the application made to him, the proper course for those who desire to question the order is to move before the judge to discharge it. We think we ought not to entertain an appeal direct from the order of

before the registrar may at any time be adjourned by him to be heard before the judge either in chambers or in Court.

"(3.) Any matter or application may, if the judge or as the case may be, the registrar, thinks fit be adjourned from chambers to Court, or from Court to chambers."

C. A. 1904 PRETORIA PIETERSBURG RAILWAY COMPANY, LIMITED, *In re.*

the registrar upon an interlocutory matter which is to be disposed of by him in chambers. Buckley J. will entertain a motion for this purpose. There has been some misapprehension about this matter, for the learned judge informs us that it has not been his practice to refuse to entertain motions to discharge orders made by the registrar in chambers. We make no order on this appeal, and we leave the costs of it to be dealt with by Buckley J.

ROMER and COZENS-HARDY L.JJ. concurred.

Solicitors: *Bompas, Bischoff & Co.; Cayley & Cayley.*

W. L. C.

C. A. 1904 *June* 23.

In re POOLE AND CLARKE'S CONTRACT.

[1903 P. 2462.]

Vendor and Purchaser—Freeholds subject to Restrictive Covenants—Covenants to be entered into by Purchaser.

In an agreement for the sale of freehold land it was stated that the property was subject to restrictive covenants. The vendor had covenanted with his vendor to observe and perform those covenants and to indemnify his vendor:—

Held, that the purchaser ought to enter into a similar covenant with the vendor, but that the covenant should be prefaced with the words "with the object and intention of affording to [the vendor], his heirs, executors, and administrators, a full and sufficient indemnity in respect of [the restrictive covenants], but not further or otherwise."

APPEAL from a decision of Kekewich J. upon a summons under the Vendor and Purchaser Act, 1874.

On May 16, 1903, an agreement was entered into between C. E. Poole of the one part and E. Clarke of the other part, whereby it was agreed that Poole should sell and Clarke should purchase the hereditaments described in the schedules thereto and the inheritance thereof in fee simple, "subject respectively to the restrictive covenants and conditions contained in the indentures of conveyance respectively referred to in the said schedules hereto," at the price of 975*l.*

C. A. 1904

POOLE AND CLARKE'S CONTRACT, *In re.*

The second schedule comprised a piece of land at Woodside, Croydon, "subject nevertheless to the restrictive covenants and conditions contained in an indenture of conveyance dated August 31, 1887, and made between H. J. C. M. Woodyer of the one part and F. P. Harbert of the other part."

When the draft of a conveyance of the property to the purchaser was tendered by him to the vendor, a question arose as to the covenant which ought to be entered into by the purchaser with reference to the restrictive covenants and conditions contained in the deed of August 31, 1887, and affecting the property comprised in the second schedule.

The purchaser insisted that that property should be conveyed to him subject to the restrictive covenants and conditions, and that he was not bound to enter into any covenant with the vendor with reference thereto.

The vendor Poole had covenanted with his vendor Harbert to observe and perform the restrictive covenants and conditions so far as they related to the premises conveyed to Poole, and to indemnify Harbert in respect thereof. The vendor insisted that the purchaser should covenant with him to observe and perform the restrictive covenants and conditions, so far as they related to the premises conveyed to the purchaser, and to indemnify the vendor, his estate and effects, therefrom.

The summons was taken out by the purchaser for the determination of this question.

Upon the hearing of the summons Kekewich J. made a declaration that the vendor was not entitled to have inserted in the conveyance a covenant by the purchaser that he would observe and perform the stipulations in question, but that the vendor was entitled to have inserted in the conveyance a covenant that the purchaser would indemnify the vendor, his estate and effects, from liability in respect of those stipulations.

The vendor appealed.

Micklem, K.C., and *Ashton Cross*, for the vendor. It is submitted that it has been the universal practice of conveyancers that in such a case the purchaser shall enter into a covenant to observe and perform the original covenants (similar

to the covenant into which the vendor had himself entered when the property was conveyed to him) and to indemnify the vendor therefrom: Dart's Vendors and Purchasers, 6th ed. vol. i. pp. 628, 632, 633; Key and Elphinstone's Conveyancing, 6th ed. vol. i. p. 430; Prideaux's Conveyancing, 15th ed. vol. i. p. 195; Davidson's Conveyancing, 5th ed. vol. i. p. 279; Cyprian Williams' Vendor and Purchaser, pp. 592, 593. At any rate, in the case of an assignment of a lease the assignee always covenants with his assignor to observe and perform the lessee's covenants contained in the lease and to indemnify his assignor against them, and the principle must be the same in the case of a conveyance of freeholds subject to restrictive covenants: *Staines* v. *Morris*. (1) It may be that if the purchaser had no notice that the vendor had entered into personal covenants and knew only that the property was subject to restrictive covenants, he might be entitled to refuse to complete his purchase. But, it is submitted, that, if he completes, he must enter into a covenant to observe and perform the restrictive covenants and to indemnify his vendor.

[VAUGHAN WILLIAMS L.J. In the case of an assignment of a lease the assignee, if in possession, is liable under the covenants in the lease by reason of privity of estate, and he may also be liable by contract with his assignor. To what extent does a purchaser from him take over the obligations of the vendor?]

The assignment will of itself subject him to the liability by privity of estate. If the vendor is under a personal liability under covenants into which he has entered, then it is submitted that the purchaser must enter into similar covenants.

[VAUGHAN WILLIAMS L.J. In either case the common law would only imply an obligation to indemnify the vendor.]

The real question is, What should be the form of the indemnity? It should be a full and complete indemnity. A mere covenant to indemnify the vendor would be of no value if the purchaser became insolvent, whereas if he entered into a covenant to observe and perform the original covenants the Court would restrain him by injunction from committing a

(1) (1812) 1 V. & B. 8; 38 R. R. 706.

C. A. 1904

POOLE AND CLARKE'S CONTRACT, *In re.*

breach. In this way only would the vendor obtain a complete indemnity.

[COZENS-HARDY L.J. Suppose a lease of a house contained a covenant by the lessee not to use the house as a public-house, and an assignee of the lease entered into a covenant with the lessee to observe and perform the lessee's covenants. Suppose the original lessor were to release the restrictive covenant: could not the lessee still obtain an injunction to restrain the assignee from committing a breach of his covenant?]

It is submitted that he could not. There would be no damage.

[ROMER L.J. Would not a general covenant to observe and perform the covenants in the lease be construed with reference to the rights of the original covenantee? It would not be the same thing as a direct covenant not to use the house as a public-house. I think the practice as regards an assignment of leaseholds has been so long settled that we cannot interfere with it.]

Moxhay v. *Inderwick* (1) and *Lukey* v. *Higgs* (2) are authorities in favour of inserting a similar covenant in the case of freeholds. The former case is almost identical with the present. The Court in effect laid down that the indemnity to the vendor should be in the form which the present appellant desires.

[ROMER L.J. I do not think there has been a settled practice with regard to freeholds. Would you object to prefacing the covenant to observe and perform the restrictive covenants and to indemnify the vendor with the words "with the object and intention of affording to [the vendor], his heirs, executors, and administrators, a full and sufficient indemnity in respect of [the restrictive covenants], but not further or otherwise"?]

The vendor would not object to that. It is what the covenant really means. The covenantee could not obtain an injunction unless he was aggrieved. The Court would dismiss an action for nominal damages when there had been no injury.

P. O. Lawrence, K.C., and *S. P. Butler*, for the purchaser.

(1) (1847) 1 De G. & Sm. 708. (2) (1855) 24 L. J. (Ch.) 495.

The question is what is a sufficient indemnity to the vendor. The matter is of importance to the purchaser, because he hopes to obtain a release of the restrictive covenants from the original covenantee. The purchaser does not wish to be at the mercy of the present vendor after such a release has been given.

[VAUGHAN WILLIAMS L.J. The purchaser will have all the protection he wants if the words which ROMER L.J. has suggested are inserted.

ROMER L.J. I think it would be right to insert those words, and in that way the difficulty will be avoided in similar cases in future.]

The purchaser will accept the covenant with that preface. But the vendor insisted on an unqualified covenant, and it is submitted that the purchaser ought not to pay costs.

ROMER L.J. I think the covenant with this preface will sufficiently protect the vendor, and he will not be able to obtain an injunction to restrain a breach of covenant in any case in which the original covenantee does not complain.

VAUGHAN WILLIAMS L.J. I think there ought to be no costs on either side in either Court. I wish to add that the practice of conveyancers with regard to the covenant to be entered into by an assignee of leaseholds must stand unaltered, and there is nothing in our judgment which will render it necessary to introduce into the covenant any other words. But, in my opinion, even in that case the covenant ought to receive the same construction as if it had been prefaced with the words which we have suggested in the present case.

ROMER L.J. and COZENS-HARDY L.J. concurred.

Solicitors: *Montague Perkins; Noon & Clarke.*

W. L. C.

C. A.
1904
Feb. 19, 20, 22;
March 30.

In re DENTON'S ESTATE. LICENSES INSURANCE CORPORATION AND GUARANTEE FUND, LIMITED *v.* DENTON.

[1902 D. 1350.]

Principal and Surety—Mortgage Debt—Mortgage Insurance Policy—Construction—Indemnity—Guarantee—Co-suretyship—Contribution.

A bank advanced 4000*l.* upon a mortgage of a public-house. The mortgage deed contained a joint and several covenant by the mortgagor and D. (who, it was recited, "had agreed to join as surety for the mortgagor") to pay to the bank, on demand by them left at the public-house, the principal and interest, subject to a proviso that D.'s liability should be limited to 1000*l.*; and the deed provided that the power of sale conferred on mortgagees by the Conveyancing Act, 1881, should be exercisable at any time after such demand without any further notice; and it was also provided and agreed that although, as between the mortgagor and D., D. was only surety for the mortgagor, yet, as between D. and the bank, D. should be considered as principal debtor for the whole mortgage debt. The mortgage deed also contained a covenant by the mortgagor to insure the mortgage debt and interest with the plaintiff company in the name of the bank. Accordingly a mortgage insurance policy was effected with the plaintiff company, whereby the company agreed that, if the bank should become entitled under their power of sale to sell the mortgage premises and should give notice in writing thereof to the company, the company would after the expiration of six months from the receipt of the notice pay the principal and interest; and it was agreed that thereupon the bank should assign to the company the mortgage debt and all securities therefor at the time of granting this policy. The company were aware of D.'s covenant. Under this policy, the mortgagor having made default, the company paid 5000*l.* for principal, interest, and costs. The mortgaged property realized 4000*l.*, and the securities for the debt were transferred by the bank to the company. The company claimed to recover the 1000*l.* balance against D.'s estate under the covenant in the mortgage deed:—

Held, (1.) that the policy was not a contract of indemnity, but was a contract of suretyship; but (2.) that upon the true construction of the contract the company were not co-sureties with D. so as to entitle him to contribution, but were guarantors to the bank against the default of both the mortgagor and D.

The principle of *Craythorne* v. *Swinburne*, (1807) 14 Ves. 160; 9 R. R. 264, applied.

Decision of Swinfen Eady J. [1903] 2 Ch. 670, reversed.

APPEAL from a decision of Swinfen Eady J. (1)

By an indenture of mortgage dated November 2, 1899, made

(1) [1903] 2 Ch. 670.

between Maude Harvey (thereinafter called the mortgagor) of the first part, George Denton of the second part, and the London City and Midland Bank, Limited, of the third part, after reciting (amongst other things) that the said bank had agreed to lend to the mortgagor the sum of 4000*l.* upon having the repayment thereof with interest secured in manner thereinafter appearing, and also that the said G. Denton had agreed to join as surety for the mortgagor to the extent and in manner thereinafter appearing: It was witnessed that the mortgagor as beneficial owner demised a leasehold public-house known as the Lord Palmerston at Highgate to the bank for the residue of a term of forty years from June 24, 1892, for which she held the same, except the last day, by way of mortgage to secure the repayment of 4000*l.* advanced to her by the bank and interest. And the mortgagor and the said G. Denton jointly and severally covenanted with the said bank that they, the mortgagor and the said G. Denton, or one of them, would pay to the said bank, upon demand by them left at the said messuage or tenement called the Lord Palmerston, the said sum of 4000*l.*, with interest for the same at the rate of 1*l.* per cent. per annum above the current Bank of England rate, but not less than 4*l.* 10*s.* per cent. per annum, and also all such further sums as should for the time being be due from the mortgagor to the said bank for money thereafter to be advanced to or for the use of the mortgagor or paid on her behalf for rent, rates, taxes, repairs, licences, insurances, or for any other matter or thing in respect of the said premises, thereby demised with interest at the rate aforesaid: "Provided always that the said G. Denton shall not be liable under the covenant lastly hereinbefore contained to pay a larger sum in the whole in respect of the principal moneys and interest taken together than the sum of 1000*l.*, with interest on such sum at the rate aforesaid from the time of demand of payment being made on the said G. Denton until payment. And the mortgagor doth hereby also covenant with the said bank that she will insure, and at all times during the continuance of this security keep insured, the principal moneys and interest hereby secured against loss in the name of the said bank with the Licenses

C. A. 1904

DENTON'S ESTATE, *In re.*

LICENSES INSURANCE CORPORATION AND GUARANTEE FUND, LIMITED *v.* DENTON.

Insurance Corporation and Guarantee Fund, Limited." The covenant continued in the usual form for payment of premiums and production of receipts, with power to the mortgagees to pay premiums, a covenant for their repayment on demand, and power to add them to the security; and after an attornment clause and a power for the bank to enter on the premises and carry on the trade of a licensed victualler, and to appoint a receiver to grant leases, it was agreed that the powers of sale conferred upon mortgagees by the Conveyancing and Law of Property Act, 1881, should be exercisable by the said bank at any time after such demand should have been left as aforesaid (whether any of the aforesaid powers should have been exercised or not) without the necessity of giving such notice requiring payment of the mortgage money as was provided for by the said Act or any notice whatever. And after an appointment of certain persons as attorneys of the mortgagor to execute any assignment of the said term of forty years which might be desired by the bank and to transfer licences, the mortgage deed contained the following proviso: "Provided always and it is hereby agreed that although as between the mortgagor and the said G. Denton, the said G. Denton is only surety for the mortgagor, yet, as between the said G. Denton and the said bank, the said G. Denton shall be considered as a principal debtor to the extent aforesaid for all moneys now advanced or hereafter to be advanced and interest thereon, and for all damages for breach of the covenants hereinbefore contained, so that the said G. Denton shall not be released by time being given to the mortgagor or by any other variation in the provisions of these presents, or anything whatsoever whereby the said G. Denton as a surety only would have been so released."

On October 28, 1899, that is five days before the date of the mortgage, the mortgagor had sent in to the plaintiffs, the Licenses Insurance Corporation and Guarantee Fund, Limited, a document headed, "Proposal to Insure first mortgage of 4000*l.*" It referred to the mortgage as dated November 2, 1899, and stated, though inaccurately, the mortgage debt as repayable by instalments, and also stated that "Mr. G. Denton

will join in the mortgage for the purpose of guaranteeing the repayment of 1000*l.* of the principal money."

By a document dated March 7, 1900, headed "Mortgage Insurance Policy," after reciting that the London City and Midland Bank (thereinafter called the insured) was entitled to the sum of 4000*l.*, payment of which with interest at the minimum rate of 4½ per cent. per annum was secured by the said mortgage dated November 2, 1899 (therein erroneously described as having been made between Maude Harvey of the one part and the insured of the other part), and that the insured had delivered to the plaintiff corporation a proposal in writing dated October 28, 1899, for "guaranteeing the said mortgage debt and interest," and which proposal contained full particulars of the said mortgage, and was deemed to be incorporated in the policy, and that it was agreed that the said proposal should be the basis of the contract of insurance thereby intended, and also reciting that the first premium of 18*l.* 15*s.* "for guaranteeing the said mortgage debt and interest" for one year had been paid, it was witnessed "that the corporation agree with the insured (subject to the conditions on the back hereof, which are to be taken as part of this policy) that if the insured shall become entitled, under the power of sale conferred by the said mortgage deed or otherwise, to sell the mortgaged property, and shall give notice in writing thereof to the corporation while this policy is in force, the corporation will, after the expiration of six calendar months from the receipt by the corporation of a claim in writing by the insured requiring payment, pay to the insured the principal money for the time being due under the said mortgage, with any interest thereon at the minimum rate which would have been or be payable if the interest were punctually paid under the said mortgage for any period not exceeding twelve calendar months preceding the date of the receipt of the claim, and with subsequent interest up to the day of payment at the same rate."

The conditions on the back of the policy affecting the points raised in the present case were as follows:—

Conditions 1 and 7 empowered the corporation, by giving six

C. A. 1904

DENTON'S ESTATE. *In re.* LICENSES INSURANCE CORPORATION AND GUARANTEE FUND, LIMITED *v.* DENTON.

months' notice, to require the insured to assign and transfer to them the mortgage debt and interest and all securities for the same on the terms of the corporation paying to the insured the amount then owing upon the mortgage for principal, interest, and costs, and within three months after the receipt of a claim under the policy to require the insured to realize the securities as their agent and on their behalf.

Condition 5 provided that the insured should, before proceeding to a sale of the mortgaged property, give not less than one calendar month's notice to the corporation, and should not sell for any sum less than the amount due for principal, interest, and costs, and otherwise in connection with the mortgage, without the previous consent in writing of the corporation.

"8. If at the time a claim is made under this policy there be any other subsisting insurance or insurances, whether effected by the insured or any other person, covering the same interest in the mortgaged property, the corporation shall not be liable to pay or contribute more than their rateable proportion.

"9. Upon payment of the amount which may become payable under this policy the insured shall assign or transfer to the corporation or their nominee or nominees the mortgage debt and interest and all securities held by the insured for the same.

"10. The insured and any claimant under this policy shall, at the expense of the corporation, do and concur in doing all such acts and things as may be necessary or reasonably required by the corporation for the purpose of enforcing any rights and remedies or of obtaining relief or indemnity from other parties to which the corporation shall be or would become entitled or subrogated upon payment under this policy, whether such acts and things shall be or become necessary or required before or after payment by the corporation."

The mortgagor made default in payment of interest, and on November 8, 1900, the bank demanded payment by her of the principal, and on the same day served on the plaintiffs a notice that they had become entitled to exercise the power of sale, and demanded payment of the principal and interest under the policy. On November 13, 1900, the bank served a notice on

the defendant Judith Lottie Denton, who was the sole executrix of George Denton, deceased, demanding payment of 1000*l.* out of his estate under his covenant. Proceedings were taken by the bank against the mortgagor, but only a small sum was recovered. The bank pressed the plaintiffs for payment, and on August 3, 1901, the plaintiffs placed on deposit at the bank a sum of 4000*l.*, pending realization of the security. Ultimately the property was sold for 4000*l.*, and the balance paid by the plaintiffs to the bank for principal and interest, after allowing for interest on the deposit, was only 18*l.* 2*s.* 8*d.*; but the plaintiffs had, in order to maintain the security, expended in repairs required by the lessors and the local authority, and in other matters, a sum of 966*l.* 10*s.* 10*d.*

Having taken a transfer of the mortgage, the plaintiffs commenced this action by originating summons, asking for a declaration that they were, under or by virtue of the covenant contained in the mortgage, creditors of the estate of the said George Denton for the sum of 984*l.* 13*s.* 6*d.*, the total of the sums of 18*l.* 2*s.* 8*d.* and 966*l.* 10*s.* 10*d.*, with interest thereon. The summons was heard by Swinfen Eady J., who made an order containing a declaration that the plaintiffs and the estate of the said George Denton were liable to contribute to the deficiency which had arisen from the realization of the mortgage security in the following proportions, namely, the plaintiffs five-sixths, and George Denton's estate one-sixth.

From that order the plaintiffs appealed, their notice of appeal asking that it might be adjudged that the plaintiffs were, under and by virtue of George Denton's covenant in the mortgage, creditors of his estate for the whole, or at least one-half, of the sum of 984*l.* 13*s.* 6*d.* and interest thereon.

Haldane, K.C., and *Owen Thompson*, for the plaintiffs. The learned judge has held that the plaintiffs stand in the position of sureties, and must therefore contribute to the loss. It is submitted that the plaintiffs were not sureties, but were insurers or underwriters. The contract was one of indemnity, and the plaintiffs, having made good the loss, are entitled to be subrogated to the rights of the assured, i.e., the mortgagees. They

C. A. 1904 — DENTON'S ESTATE, *In re.* — LICENSES INSURANCE CORPORATION AND GUARANTEE FUND, LIMITED *v.* DENTON.

are entitled to the benefit of Denton's covenant contained in the mortgage. The distinction between suretyship and a contract of indemnity is illustrated by *Dane* v. *Mortgage Insurance Corporation* (1); *Finlay* v. *Mexican Investment Corporation* (2); see Rowlatt on Principal and Surety, p. 9. But if, contrary to the above contention, the plaintiffs' contract is one of suretyship, it is suretyship for the surety as well as for the principal debtor—that is, to be liable only in default of both. Thus the plaintiffs do not stand in the position of co-sureties, and they are not liable to contribution: *Craythorne* v. *Swinburne* (3); *Seaton* v. *Heath.* (4)

But if the plaintiffs are to be treated as co-sureties, the extent of their obligation is shewn by such cases as *Ellesmere Brewery Co.* v. *Cooper* (5); *Ellis* v. *Emmanuel* (6); *Steel* v. *Dixon* (7); *Dering* v. *Earl of Winchelsea.* (8)

Denton was surety for the whole debt, though he could not be called on to pay more than 1000*l.* He was not surety for only 1000*l.* He should pay half the loss.

Eve, K.C., and *J. Henderson*, for the defendant. If the corporation and Denton were co-sureties, the distinction between becoming surety for a limited part of a debt and becoming surety for the whole debt with a limit on the liability does not affect the question of contribution, and the result is, as Swinfen Eady J. decided, that Denton's estate must pay one-sixth and the plaintiffs five-sixths of the sum payable: *Steel* v. *Dixon.* (7) Upon the construction of this contract it is submitted that the corporation and Denton were co-sureties. The guarantees in the policy and in Denton's policy were part of one transaction, and in substance there was no difference between the liability of the two parties except that the corporation were to have six months' notice before their obligation to pay arose. The character of the contract is not altered by the fact that it is called a policy of insurance: *Seaton* v. *Heath.* (9)

(1) [1894] 1 Q. B. 54, 60.
(2) [1897] 1 Q. B. 517.
(3) 14 Ves. 160; 9 R. R. 264.
(4) [1899] 1 Q. B. 782.
(5) [1896] 1 Q. B. 75.
(6) (1876) 1 Ex. D. 157.
(7) (1881) 17 Ch. D. 825.
(8) (1787) 1 Cox, 318; 2 W. & T. (7th ed.) 535; 1 R. R. 41.
(9) [1899] 1 Q. B. 792.

Owen Thompson, in reply, referred to *Castellain* v. *Preston*. (1)

Cur. adv. vult.

March 30. VAUGHAN WILLIAMS L.J. This is a claim made by the Licenses Insurance and Guarantee Fund Corporation, as assignees of a mortgage deed, against the estate of Denton, deceased, a party to the mortgage deed, on a covenant therein contained; and the only defence raised is that the corporation and Denton are co-sureties for Miss Harvey, the mortgagor, and that Denton is therefore entitled to deduct from the claim of the plaintiff corporation the contribution due as between two co-sureties. The corporation contend that they are not co-sureties with Denton, but are sureties both for the principal debtor, the mortgagor, and for Denton, the surety under the terms of the mortgage deed; and that, this being so, there is no contribution according to the authority of the decision of Lord Eldon in *Craythorne* v. *Swinburne*. (2)

The question whether the plaintiffs and defendant stand or do not stand in the relation of co-sureties within the meaning of this decision is the only question in the case. Swinfen Eady J. has decided that the relation is that of co-sureties, and that Denton has a right of contribution. He bases this conclusion, as I understand, on the ground that according to the terms of the policy of insurance, which embodies the guarantee of the plaintiff corporation, both the corporation and Denton are liable for the same debt upon the same default of the mortgagor. I think that the plaintiffs and defendant are liable for the same debt upon the same default of the mortgagor for the reasons given by Swinfen Eady J. in his judgment; but there is this difference, that whereas the liability of Denton to pay arises directly on demand left at the mortgaged premises, the liability of the corporation is only to pay after the expiration of six calendar months from the mortgagees, the bank, becoming entitled to exercise the power of sale conferred by the mortgage deed and giving notice thereof to the corporation; so that, even assuming the occasion of the liability arising to be the

(1) (1883) 11 Q. B. D. 380. (2) 14 Ves. 160; 9 R. R. 264.

C. A. 1904

DENTON'S ESTATE, *In re.* LICENSES INSURANCE CORPORATION AND GUARANTEE FUND, LIMITED *v.* DENTON.

Vaughan Williams L.J.

same because the power of sale is conferred upon leaving a demand for payment at the mortgaged premises without any further demand or notice (thus departing from the provisions of the Conveyancing Act, 1881), yet the time when payment will accrue due differs by six months, and I do not think that this difference can be left out of consideration when determining whether the corporation and Denton are co-sureties.

Perhaps it would be convenient now to consider briefly what are the material facts in this case, and what is the nature of the claim. [His Lordship then read the mortgage deed, and continued:—]

A mortgage insurance policy was executed by the corporation on March 7, 1900, and it is alleged by the plaintiff corporation that this policy was effected in pursuance of a proposal for insurance dated October 28, 1899, which was put in evidence. There is some little difficulty about this, as the proposal and the policy do not quite accord, the proposal relating to a debt repayable by annual instalments, which is not the case with the mortgage debt. But I think that the proposal is sufficient evidence that the insurance was effected by the corporation on the basis that the mortgage debt which the corporation were insuring would be secured by a mortgage deed in which Denton would join for the purpose of guaranteeing the repayment of 1000*l.* of the principal money. The policy, however, makes no mention of Denton being a party to the mortgage deed. On the contrary, it describes the mortgage deed as made between Maude Harvey of the one party, and the "insured" (that is, the bank) of the other part. It refers, however, to a proposal in writing of October 28, 1899, for guaranteeing the said mortgage debt and interest, and recites that it is agreed that the said proposal shall be the basis of the contract of insurance intended. The premium of 18*l.* 15*s.* is recited as the first premium for guaranteeing the said mortgage debt and interest, and the policy goes on to witness as follows: [His Lordship then read the witnessing part, and continued:—]

I think the proper inference of fact to draw from the proposal of October 28, 1899, and the mortgage deed of November 2, 1899, and the policy of March 7, 1900, is that,

to the knowledge alike of the mortgagor and the mortgagees, Denton and the corporation, at the date both of the mortgage deed and of the policy, it was intended that Denton should join in the mortgage as surety, and that the mortgage debt and interest should be guaranteed or insured by the corporation: the words "guarantee" and "insure" are used as synonymous in the policy.

I mention this inference because I think that the fact that there was one transaction only, to the details of which all were privy, may not be immaterial when one is considering whether the corporation ought to be regarded as co-sureties with Denton for the mortgagor, or as sureties for both the mortgagor and Denton under a distinct collateral security.

I will now consider what is the plaintiffs' claim on this summons. [His Lordship then read the summons, and proceeded:—]

The facts as to the 984*l.* 13*s.* 6*d.* there claimed are these. The bank having left a demand at the mortgaged premises, gave notice to the corporation, under condition 5 of the policy, of their intention to exercise the power of sale, and proceeded, not strictly in accordance with the conditions of the policy, to sell the property. This sale realized the 4000*l.* and discharged the whole of the principal money owing on the mortgage. The source of the money thus discharging the principal, although it may have passed through the hands of the insurance corporation, was the proceeds of sale. The plaintiff corporation meanwhile expended the greater part of the 984*l.* 13*s.* 6*d.* sought to be recovered on this summons on matters such as repairs, &c., clearly necessary and proper for the maintenance of the mortgage security. The utterly unbusinesslike manner in which the business of the corporation was done makes it difficult to ascertain the true facts.

It might be suggested that this was a voluntary expenditure by the corporation, who had a clear interest, as Denton also had, that the mortgage security should not be wasted. But I think, on the evidence, that this expenditure may fairly be taken to be expenditure by the corporation at the request of the bank, and thus expenditure by the bank as mortgagees.

C. A. 1904

DENTON'S ESTATE, *In re.*

LICENSES INSURANCE CORPORATION AND GUARANTEE FUND, LIMITED *v.* DENTON.

Vaughan Williams L.J.

If the expenditure cannot be so regarded, there is an end of the claim; but if it can be so regarded, the only question is, as I have already stated, Are Denton and the corporation co-sureties so as to entitle Denton to contribution?

In the first place, I will deal with a contention raised by the corporation and based on the decision of the Court of Appeal in *Dane* v. *Mortgage Insurance Corporation*. (1) This contention is that, apart from anything else which might negative co-suretyship between the corporation and Denton, the very form of the obligation which they had undertaken towards the bank was sufficient to shew that the corporation had entered, not into a contract of suretyship, but into a contract of insurance. No doubt the form is that of a policy of insurance; but I think there is nothing in the form of the contract between the bank and the corporation being that of a policy of insurance to prevent the contract being one of guarantee. I would refer to the judgment of Romer L.J. in *Seaton* v. *Heath* (2) which on this point is unaffected by the reversal in the House of Lords of the judgment of the Court of Appeal. Romer L.J., in discussing the difference in substance between these two classes of contract, says: "The difference between these two classes of contract does not depend upon any essential difference between the word 'insurance' and the word 'guarantee.' There is no magic in the use of those words. The words, to a great extent, have the same meaning and effect; and many contracts, like the one in the case now before us, may with equal propriety be called contracts of insurance or contracts of guarantee."

The distinction in substance, in cases in which the loss insured against is simply the event of the non-payment of a debt, seems to be, as I read the judgment of Romer L.J., between contracts in which the person desiring to be insured has means of knowledge as to the risk and the insurer has not the same means, and those cases in which the insurer has the same means. Now it seems to me that in the case of this mortgage debt the insurance corporation, knowing the terms of the mortgage debt and the exact nature of the property

(1) [1894] 1 Q. B. 54. (2) [1899] 1 Q. B. 782, 792.

forming the security, had just as much means of ascertaining the nature of the risk as the bank had; and I do not think that the mere fact that the contract was made between the creditor and the insurance corporation, and not between the mortgagor-debtor, Miss Harvey, and the corporation, would of itself determine the character of the contract to be that of insurance and not of suretyship. This being so, the form and circumstances of the contract being consistent with the relation of co-suretyship between the plaintiff corporation and Denton, let us see if the facts, dates, and the contents of the mortgage deed are such as to negative this contract—which, according to its terms, is a contract of suretyship guaranteeing payment by the mortgagor—being a contract of suretyship constituting co-suretyship in relation to the contract of suretyship taken by Denton on himself by the mortgage deed.

If the policy is looked at, it will be seen that, in form at all events, both the corporation and Denton guarantee the payment of the mortgage debt by the mortgagor, Miss Harvey. The event upon which the obligation to pay arises is the same in each case; and although the corporation have six months within which to pay, yet the obligation neither of the corporation nor of Denton is dependent on what the mortgage security realizes. Taking these matters into consideration, there seems much to support the conclusion in fact of Swinfen Eady J. that the insurance corporation were sureties for and guaranteed the debt of Miss Harvey, and were not sureties only in the event that neither Miss Harvey nor Denton paid. If this conclusion, which seems to me to be a conclusion in fact, is right, it puts the case outside the case of *Craythorne* v. *Swinburne*. (1) I think it is a question of fact. It seems plain from the judgment of Lord Eldon in that case that, in considering the question whether the contract of insurance, the second contract in point of date, is to be considered as a collateral or supplemental security, the Court may take into consideration, not only the words of the respective contracts, but also extrinsic evidence. Giving consideration to this evidence as well as to the words of the respective contracts, still, sitting by myself, I

(1) 14 Ves. 160; 9 R. R. 264.

C. A. 1904 DENTON'S ESTATE, *In re.* LICENSES INSURANCE CORPORATION AND GUARANTEE FUND, LIMITED *v.* DENTON.

should have hesitated to differ from the conclusion of the learned judge, especially as I do not think that the mere fact that the corporation knew, at the time at which the policy was effected, from the mortgage deed or the proposal, that Denton was a surety, was sufficient to negative the relation of co-suretyship; and it is certainly a case in which I should have wished to apply the maxim that equality is equity if the facts allowed it; but as my brethren take a contrary view of the facts, I do not think that in such a doubtful case, turning largely on inferences of fact, I ought to refuse to concur in the judgment of the Court.

STIRLING L.J. The question in this case is what is the true nature of the contract entered into between the London City and Midland Bank (mortgagees of a public-house for 4000*l.* and interest, George Denton, the testator in the action, being surety for the mortgagor to the extent of 1000*l.*) and the plaintiffs in the action. The defendant in the action, who is the legal personal representative of George Denton, contends that the contract was one of suretyship, and that by virtue of it the plaintiffs became co-sureties with George Denton, and this is the view which has been taken by Swinfen Eady J. The plaintiffs, on the other hand, insist that the contract is not one of suretyship at all, but is one of insurance or indemnity, such as was held by Lord Esher M.R. to exist in *Dane* v. *Mortgage Insurance Corporation* (1); but they also urge that, even if the contract was one of suretyship, they, the plaintiffs, did not become co-sureties with Denton, but in fact guaranteed the bank against Denton's default, as was held to be the case in *Craythorne* v. *Swinburne*. (2) The answer to the question depends, to a great extent, on the construction of a document dated March 7, 1900, and headed "Mortgage Insurance Policy"; but before dealing with that I think it desirable to refer shortly to the main provisions of the mortgage deed, which bears date November 2, 1899. [His Lordship referred to the terms of the mortgage deed, and, upon the covenant by the mortgagor to insure and keep insured "the principal moneys

(1) [1894] 1 Q. B. 54. (2) 14 Ves. 160; 9 R. R. 264.

and interest against loss," he observed that it appeared to him to be so framed as to entitle the mortgagees and the plaintiffs to enter into a contract of either of the kinds contended for by the plaintiffs; and he continued as follows:—]

On October 28, 1899, before the mortgage had been executed, the solicitors of the mortgagor submitted to the plaintiffs a "proposal to insure first mortgage of 4000*l.*"

In this document various particulars are given as to the terms of the mortgage which are inaccurate, but the following statement occurs: "Mr. G. Denton will join in the mortgage for the purpose of guaranteeing the repayment of 1000*l.* of the principal money." It is not disputed that the document of March 7, 1900, was the result of this proposal. That document is headed "Mortgage Insurance Policy," and in the recitals the proposal of October 28, 1899, is recited, and "it is agreed that the said proposal shall be the basis of the contract of insurance hereby intended." On the other hand, the proposal is recited as being one "for guaranteeing" the mortgage debt and interest, and the premium is stated to be "for guaranteeing" the mortgage debt and interest. The mortgage deed is stated to be dated November 2, 1899, and to be made between Maude Harvey of the one part and the insured of the other part; and it does not appear on the face of the document itself that Denton was a surety for the debt. Still, notwithstanding all inaccuracies in the proposal and in the recitals, there is no question that the mortgage of November 2, 1899, as executed by the mortgagor and Denton, was that to which the document of March 7, 1900, was intended to refer, and with reference to which it must be construed. I think, therefore, that the document must be read as relating to a mortgage in respect to which Denton was, to a limited extent, surety for payment of principal and interest. The operative part of the document is as follows: [His Lordship read it, and also conditions 8, 9, and 10.]

In order that the plaintiffs may become liable under the policy it is necessary (1.) that the insured, the bank, should become entitled under the power of sale in the mortgage, or otherwise, to sell; and it will be remembered that the power

C. A. 1904 — DENTON'S ESTATE, *In re.* — LICENSES INSURANCE CORPORATION AND GUARANTEE FUND, LIMITED *v.* DENTON. — Stirling L.J.

of sale in the mortgage becomes exercisable upon a demand for payment, in accordance with the covenant of the mortgagor and the surety, being left at the public-house, and that the mortgagor and the surety both become liable upon such demand being so left; (2.) that the insured should give notice in writing to the plaintiffs of their having become entitled to exercise the power of sale; (3.) that the insured should make a claim by writing on the plaintiffs requiring payment.

These conditions being satisfied, the plaintiffs bind themselves, after the expiration of six calendar months from the receipt of the claim in writing, to pay to the insured the principal money for the time being due on the security, with interest. In arriving at this sum there would be taken into account all sums paid by the mortgagor or by the surety or realized out of the mortgaged property.

Upon payment by the plaintiffs of the amount payable, they are entitled under condition 9 to have assigned or transferred to them the mortgage debt and interest, and all securities held by the insured for the same; and this would, according to the natural meaning of conditions 9 and 10, include, in my opinion, the benefit of the covenant by the surety to the full extent to which the mortgagees were entitled thereto.

The result is that a period of six months is to elapse between the claim made on the plaintiffs and payment. During that period the bank were left to realize their securities as they saw fit, unless the plaintiffs chose to intervene under the provisions of condition 7. At the expiration of the period the plaintiffs were bound to pay the principal and interest remaining due on the security, quite irrespective of any question whether loss had occurred or was likely to occur. Upon payment, however, the plaintiffs, as it seems to me, became entitled to all the rights and remedies of the mortgagees, and to enforce them just as the mortgagees might have done as well against the surety as against the mortgagor. Swinfen Eady J. held that the instrument of March 7, 1900, was not merely an insurance against loss, and in that respect I agree with him; but it does not follow that the instrument created a mere contract of co-suretyship with Denton. The

learned judge, however, does not appear to have had presented to him the second contention raised on behalf of the plaintiffs and strongly urged in this Court: at all events, he does not deal with it explicitly in his judgment. The question is, in my opinion, one of difficulty occasioned by the inaccuracies and ambiguities which are found in the instrument of March 7, 1900—an instrument framed by the plaintiffs themselves. I have, however, come to the conclusion that, regard being had to all the circumstances, the true meaning of the parties to the transaction was, not that the plaintiffs were to become co-sureties with Denton, but that, as between themselves and the bank, Denton should be in the position of a principal, or, in other words, that the transaction was of the same nature as that which was the subject of decision in *Craythorne* v. *Swinburne*. (1) Taking this view, I think that the appeal ought to be allowed.

COZENS-HARDY L.J. This is a claim by the Licenses Insurance Corporation, hereinafter called "the corporation," against the estate of Denton, who joined as surety in a mortgage by Harvey to a bank. The mortgaged property has been sold for less than the amount due to the bank. The deficiency, which is less than 1000*l.*, has been paid by the corporation to the bank, and a transfer has been executed by the bank to the corporation of the mortgage debt and all securities for the same. There is no answer to this claim unless it can be established that the corporation and Denton were co-sureties, in which case only a right of contribution would arise. Swinfen Eady J. has adopted this view, and has made a declaration accordingly. The corporation appealed against this order, and they contend—(1.) that their contract with the bank was properly a contract of insurance and not of suretyship; and, (2.) in the alternative, that if they were not insurers they were sureties for both Harvey and Denton, and not co-sureties with Denton for Harvey. The first contention was overruled by the learned judge. The second contention, although raised,

(1) 14 Ves. 160; 9 R. R. 264.

C. A. 1904

DENTON'S ESTATE, *In re.* LICENSES INSURANCE CORPORATION AND GUARANTEE FUND, LIMITED *v.* DENTON.

Cozens-Hardy L.J.

seems not to have been strongly insisted upon before him, and it is not directly dealt with in his judgment; but it has been forcibly pressed upon us, particularly by Mr. Owen Thompson in his able argument. It is based upon *Craythorne* v. *Swinburne*. (1) In that case Lord Eldon held that parol evidence was admissible to shew whether in truth the defendant was a co-surety with the plaintiffs for the principal debtor, and as such bound to contribute, or was a surety for both the principal debtor and the plaintiffs, and as such under no liability to contribute. The principles there laid down are clear, but I have found great difficulty in applying them to the very peculiar circumstances of the present case.

There are three documents which, and which alone, have to be considered. The mortgage dated November 2, 1899, and made between Harvey of the first part, Denton of the second part, and the bank of the third part, is to secure an advance of 4000*l*. Denton plainly joins as surety. There is a joint and several covenant for payment on demand, with a proviso limiting Denton's liability under the covenant to 1000*l*. Then follows a covenant by the mortgagor that she will insure and keep insured the principal moneys and interest thereby secured against loss in the name of the bank with the corporation; and there is a power of sale given to the bank exercisable at any time after demand and without any notice; and there is the usual provision that although, as between Harvey and Denton, Denton was only surety, yet, as between Denton and the bank, Denton should be considered as a principal debtor to the extent aforesaid—that is, to the extent of 1000*l*. It is apparent on the face of the mortgage deed that it was part of the bargain with the bank that a security of some kind should be procured from the corporation.

The "Proposal to Insure first mortgage of 4000*l*." is dated October 28, 1899. It is obviously inaccurate in some respects. It refers to the mortgage dated November 2, 1899, and states the mortgage debt as repayable by instalments, although this is not the fact. It mentions, however, that Denton will join

(1) 14 Ves. 160; 9 R. R. 264.

in the mortgage for the purpose of guaranteeing the repayment of 1000*l.* of the principal money.

The document imposing a liability on the corporation towards the bank is dated March 7, 1900, four months after the mortgage. It is headed "Mortgage Insurance Policy." It inaccurately recites the mortgage as made between Harvey of the one part and the bank of the other part, and omits all reference to Denton. [His Lordship read the material parts of the policy and the indorsed conditions 1, 7, 8, 9, and 10.]

It will be observed that the obligation of the corporation to pay does not arise for six months after Denton's obligation to pay arises; and, further, that the corporation stipulate with the bank for transfer of all securities held by the bank and to be subrogated to all rights and remedies of the bank against other parties as soon as the corporation pay under the policy—an event which has happened.

Now, on the construction of this document, I agree with Swinfen Eady J. that it was not an insurance against loss, but was a guarantee of the mortgage debt, and I adopt the reasoning contained in his very careful judgment on this point.

It only remains to consider the second, or, what I may call the *Craythorne* v. *Swinburne* (1), point. What was it that the corporation guaranteed? If I only look at the policy, it is reasonably clear that the corporation guaranteed the debt due from Harvey, the principal debtor, and nothing more. If, however, I look at the proposal which is "deemed to be incorporated in the policy," and also at the mortgage deed, I think it appears that the corporation guaranteed a partially guaranteed debt; or, in other words, guaranteed that Harvey to the full extent and Denton to the extent of 1000*l.* would pay the bank, Harvey and Denton being, as between themselves and the corporation, both principal debtors. It is of no moment that Denton is not shewn to have been party or privy to the proposal or the policy, for the only obligation imposed on Harvey by the covenant in the mortgage deed to which Denton was a party was to insure against loss.

(1) 14 Ves. 160; 9 R. R. 264.

C. A.
1904
DENTON'S ESTATE, *In re.*
LICENSES INSURANCE CORPORATION AND GUARANTEE FUND, LIMITED *v.* DENTON.

This obligation would have been exactly satisfied by a policy of insurance strictly so called. Denton had no right to expect to be relieved by having the corporation as co-sureties. He must accept the position, whatever it may be, as between the bank and the corporation. Upon the whole I think the appellants' contention on this point must prevail, notwithstanding the difficulties created by the forms of the instruments.

Solicitors: *Jennings, Son & Allen; Loxley, Elam & Gardner.*

G. I. F. C.

WARRINGTON J.
1904
May 9; *June* 7.

In re LEAD COMPANY'S WORKMEN'S FUND SOCIETY.
LOWES *v.* GOVERNOR AND COMPANY FOR SMELTING DOWN LEAD WITH PIT AND SEA COAL.

[1904 L. 429.]

Benefit Society—Unregistered Friendly Society — Partnership—Insolvency of Society—Action for Dissolution—Jurisdiction to wind up—Unexpended Funds—Scheme for Distribution—Notice of Judgment—Service—Rules of Supreme Court, Order LV., *rr.* 35, 35*a*.

In the year 1817 a society for the benefit of the workmen in a company established by Royal Charter was founded, its main objects being to provide, by mutual assistance among its members, aid out of the society's funds towards a comfortable subsistence in times of sickness and old age. Membership was confined to workmen and others in the employment of the company. The members on their admission paid fines varying in amount according to age, and a yearly contribution of 30*s*. to the funds of the society until they attained sixty-five, when they ceased to contribute and became entitled to a pension of 6*s*. a week for life. The society was managed by a general committee in accordance with printed rules which were varied from time to time, the latest being those sanctioned in 1891. The funds stood in the name of the company as trustee. The society was never registered under the Friendly Societies Acts, and there was no provision in the rules for a dissolution. The company had ceased to carry on business, and no new members had been admitted since 1899. There were 439 members, of whom 88 had attained the age of sixty-five; and it was admitted that, with no new members coming in, the society was insolvent, and that the younger members would probably receive nothing if the former allowances for sick

pay and pensions were continued. A large majority of pensioners and non-pensioners had voted for a dissolution by the Court, and an action was commenced, in which all classes of members were represented, claiming a dissolution :—

Held, that the Court had jurisdiction to interfere and wind up the society, and to ascertain the rights of all the persons beneficially interested in its assets by a reference to chambers to settle a scheme for the equitable distribution of the remaining funds.

Pearce v. *Piper*, (1809) 17 Ves. 1; 11 R. R. 1, examined and applied.

Held, also, following *In re Printers and Transferrers Amalgamated Trades Protection Society*, [1899] 2 Ch. 184, that the principle to be adopted in calculating the amounts payable to the various members was, that the funds were divisible among existing members at the time of the dissolution in proportion to the amount contributed by each member for fines on admission and subscriptions, irrespective of any payments made in accordance with the rules, and without interest.

Form of advertisement in lieu of service of notice of judgment.

ACTION.

The only question raised in this action which calls for any report was as to the jurisdiction of the Court to dissolve or wind up an unregistered friendly society. The facts and the rules of the society, so far as material, were as follows :—

The Governor and Company for Smelting down Lead with Pit Coal and Sea Coal was established by Royal Charter about 1700, and formerly carried on extensive mining and smelting works in the north of England. In the year 1817 a society for the benefit of the workmen in the employ of the company was founded called the Lead Company's Workmen's Fund Society, to which the company made considerable contributions during the earlier stages of its existence. No deed of any kind was ever entered into by or on behalf of the company with reference to this society, but the funds of the society stood in the name or in the books of the company, and the society was managed by a general committee in accordance with printed rules, which were varied from time to time, the latest rules being those sanctioned in 1891, the governor and company being the trustees of the fund. The objects of the society as stated by rule 3 were "to promote and establish union, friendship, and mutual assistance among its members, and to provide for them by means and out of the society's funds, aid towards a comfortable subsistence in times of sickness and

WARRINGTON J.

1904

LEAD COMPANY'S WORKMEN'S FUND SOCIETY, *In re.*

LOWES *v.* GOVERNOR AND COMPANY FOR SMELTING DOWN LEAD WITH PIT AND SEA COAL.

old age, and other benefits and advantages as are hereinafter mentioned."

By rule 4 the purposes to which the funds of the society were to be applicable were to be, "The provision of such benefits and advantages as aforesaid in accordance with the rules of the society."

Provision was made for the management of the society by means of a general committee, assisted by a finance committee and certain local committees; and by rule 20 it was provided that, "The governor and company shall henceforth be the custodians (in the manner, to the extent, and upon the terms hereinafter expressed) of the invested funds of the society so long as they continue to be willing to act in that capacity." There were also provisions for the appointment of other persons to be trustees of the society, and for the investment of its funds, with power to raise out of those investments any money that might be required for the purposes of the society.

Membership was confined to regular workmen, agents, clerks, and others in the employment of the company. The members on their admission paid fines varying in amount according to their respective ages on the day of admission, and a yearly contribution of 30*s.* to the society's funds until they attained the age of sixty-five. The benefits given by the society to its members by rule 22 included an allowance of 7*s.* a week to every member who had not attained sixty-five, and was confined to his bed by sickness or infirmity, with a smaller allowance in the event of partial incapacity, and then the rule proceeded as follows: "Every member upon attaining the age of sixty-five years shall cease to contribute to the society, and he can then no longer claim any allowance for accident or sickness, but shall become indefeasibly entitled to a weekly allowance of 6*s.* for the remainder of his life, whether in sickness or in health, and without being under any restrictions as to work, and such weekly allowance shall not be liable to forfeiture under any of these rules." There was a provision for excluding a member from the society if his subscription was in arrear for a year, and for stopping the allowance for malingering,

intemperance, or misconduct, and other reasons defined by the rules. The society was never registered under the Friendly Societies Acts.

Owing to a fall in prices the company discontinued working their mines, surrendered their royalties, and were now selling off their property. The local officials of the company in the counties of Durham, Cumberland, and Westmoreland had all been discharged, and the company had ceased to carry on business, and no longer employed any workmen, and no new members of the society had been admitted since 1899. The invested funds of the society now consisted of some 32,000*l.* Consols standing in the name of the company. There were at present 439 members of the society of whom eighty-eight had attained the age of sixty-five years; and it was admitted that, with no new members coming in, the society was insolvent, and that if it continued to pay the 6*s.* a week pension to the members who had attained sixty-five, out of its capital, and also to make the usual sick-pay allowances, the younger members of the society would probably receive nothing.

As a further result of the discontinuance of their business by the company, there were no officials of the company to carry into effect some of the rules, or to frame further rules; and the local committees had ceased to exist.

The action was commenced by writ, which was intituled, "In the matter of the trusts of the trust funds of the Lead Company's Workmen's Fund Society," and "In the matter of the Trustee Act, 1893." The plaintiffs sued on behalf of themselves and all other members of the above-named society who were under the age of sixty-five years; and the defendants were the governor and company, and two members, pensioners of the society, over the age of sixty-five years, and other persons representing pensioners and non-pensioners, who resisted a dissolution. The writ claimed, "To have the society dissolved and the affairs thereof wound up under the direction of the Court," "To have new trustees of the trust funds appointed," and by amendment "To have the rights of all parties beneficially interested in the trust funds ascertained and declared."

WARRINGTON J.

1904

LEAD COMPANY'S WORKMEN'S FUND SOCIETY, *In re.* LOWES *v.* GOVERNOR AND COMPANY FOR SMELTING DOWN LEAD WITH PIT AND SEA COAL.

The matter came before the late Byrne J. in March last, when he considered it desirable that the opinion of the members should be ascertained as to the desirability of a dissolution. A circular with a voting paper attached was accordingly sent out convening a meeting for this purpose, with the result that 54 pensioners and 250 non-pensioners voted for a dissolution by the Court, and 29 pensioners and 31 non-pensioners voted against a dissolution in any form either by the Court or under the Friendly Societies Act.

The result of this poll of the members was embodied in an affidavit, and the action was restored to the list, and now came on for hearing.

Norton, K.C., and *MacSwinney*, for the plaintiffs. This society is in effect a partnership, and the Court has jurisdiction to dissolve it or wind it up: *Lloyd* v. *Loaring* (1); *Pearce* v. *Piper* (2), a case very like the present, where the Lord Chancellor speaks of directing inquiries, "with the assistance of a calculator," as to the equitable distribution of the fund subscribed. A society of this kind can only be considered in this Court as a partnership: *Beaumont* v. *Meredith* (3); *Silver* v. *Barnes.* (4) That they are not charities seems clear from *Cunnack* v. *Edwards.* (5) An unregistered friendly society can be wound up under the Companies Act, 1862: *In re Alfreton District Friendly and Provident Society* (6); *In re Independent Protestant Loan Fund Society* (7); but the jurisdiction of the Court over societies of this kind is not ousted by the fact that the Legislature has provided other means of winding up under the Companies Acts: *Jones* v. *Lord Charlemont* (8), *Clements* v. *Bowes* (9), and Buckley on Companies, 8th ed. p. 489. The plaintiffs represent a class with sufficient interest to entitle them to have this society wound up and the accounts taken: *Ward* v. *Sittingbourne and Sheerness Ry. Co.* (10) True, the partners in this quasi-partnership are numerous, but they can

(1) (1802) 6 Ves. 773.
(2) 17 Ves. 1; 11 R. R. 1.
(3) (1814) 3 V. & B. 180.
(4) (1839) 6 Bing. N. C. 180.
(5) [1896] 2 Ch. 679.
(6) (1863) 7 L. T. 817.
(7) [1895] 1 I. R. 1.
(8) (1848) 16 Sim. 271.
(9) (1852) 17 Sim. 167.
(10) (1874) L. R. 9 Ch. 488.

be divided into classes, and as a fact each class here is separately represented; if each class and all conflicting interests, as in this case, are represented, a decree for dissolution or winding-up can be made without having all the partners parties to the action: Lindley on Partnership, 6th ed. p. 465. A representative order has been made in the present case under Order XVI., r. 9, and no objection to the action can be sustained on this ground: *Duke of Bedford* v. *Ellis*. (1) In this case, too, there is a large majority in favour of a dissolution by the Court; the majority has power to control the minority: *M'Kenny* v. *Barnsley Corporation* (2); and to control the disposition of the funds: *Oldham Our Lady's Sick and Burial Society* v. *Taylor*. (3) The majority could have registered this society under the Friendly Societies Acts, and then have forced a dissolution. [*Kemp* v. *Wright* (4) and *Botten* v. *City and Suburban Permanent Building Society* (5) were referred to as to the rights of members on a dissolution.] This society is not an illegal partnership, and the accession of new members did not make it so: *Shaw* v. *Simmons* (6); nor the fact that it consists of more than twenty members and is not registered: *Marrs* v. *Thompson*. (7) The evidence is clear that if the society is allowed to go on the class represented by the plaintiffs will receive nothing out of the funds; a good case is made out for the interference of the Court so that an equitable distribution of what is left may be made.

Cave, K.C., and *Adler*, for persons representing pensioners, who had voted in favour of a dissolution by the Court, adopted the above argument and supported the plaintiffs' application.

Rowden, K.C., and *P. S. Stokes*, for persons representing pensioners and non-pensioners who voted against a dissolution in any form. This society is not a partnership within the definition of the Partnership Act, 1890, or within the general acceptation of the word, and it is a misuse of the word "partnership" to apply it to societies of this character: Lindley on Partnership,

(1) [1901] A. C. 1.
(2) (1894) 10 Times L. R. 533.
(3) (1887) 3 Times L. R. 472.
(4) [1895] 1 Ch. 121.
(5) [1895] 2 Ch. 441.
(6) (1883) 12 Q. B. D. 117.
(7) (1902) 86 L. T. 759.

WARRINGTON J.
1904
LEAD COMPANY'S WORKMEN'S FUND SOCIETY, *In re.*
LOWES *v.* GOVERNOR AND COMPANY FOR SMELTING DOWN LEAD WITH PIT AND SEA COAL.

6th ed. p. 13. An association having for its object, not the acquisition of gain, but the mutual assistance and benefit of its members, is not a "partnership": *Reg.* v. *Robson* (1); and unless this is a partnership, the Court has no jurisdiction to wind it up or dissolve it. No authority has been cited to shew that the Court has jurisdiction to wind up an association of this kind: none of the cases cited by the plaintiffs are precisely in point, and *Pearce* v. *Piper* (2) is not a decision that there is jurisdiction to deal with the funds of this society in a case like the present. There is no such thing as a dissolution of a trust. The present application is not made under the jurisdiction conferred by the Companies Acts. But, assuming there is jurisdiction, no case is made out for the interference of the Court; the mere fact that there is some difficulty in deciding exactly what is to be done with the funds is no ground for a dissolution; the rules provide means for increasing the funds if they are inadequate.

Norton, K.C., in reply. This may not be a "partnership" in the common acceptation of the term; but it is a joint venture in which all the members are interested, and if in the circumstances the Court does not interfere to make an equitable distribution of the funds, some of the members will be deprived of all benefit in the funds, while others will receive more than they are entitled to receive. This is a trust for the benefit of all the members, and the Court can and does put an end to a trust when its funds are insufficient, and makes an equitable distribution of what is left. The case is within the principle of the decision in *Pearce* v. *Piper*. (2)

T. H. Carson, K.C., and *A. J. Spencer*, for the lead company, as trustee of the fund, took no part in the argument beyond stating that the company was willing to retire and to hand over the funds to any new trustees who might be appointed by the Court.

WARRINGTON J. This is a somewhat difficult question, but I think I see my way to give my decision.

[After referring to the form of the action and the claim made

(1) (1885) 16 Q. B. D. 137. (2) 17 Ves. 1; 11 R. R. 1.

by the writ, and having shortly stated the facts, the material provisions in the rules, and the result of the evidence of Mr. Marcus Nathan Adler, the actuary of the society, as to its present insolvency, his Lordship continued :—]

The fact also that the company have given up business seems to me to go a long way to deprive the society of the substratum on which it was founded, namely, as a society for the benefit of those who were, or have been, workmen employed by the company.

Now what is proposed, if that is material for the present purpose—which I rather doubt, but I may as well allude to it—is that judgment should be pronounced for winding up the affairs of the society, that the contributions should cease, and that the existing assets should be divided among the members of the society equitably according to the interests which, under the rules, they have. With regard to that, it is said that the Court has no power to make an order of that kind. Mr. Norton, on behalf of the plaintiffs, in the first instance, put the case on the ground of partnership. He said that this was a partnership which could be wound up like any other business, and he cited certain cases in support of that contention, namely, *Lloyd* v. *Loaring* (1), *Beaumont* v. *Meredith* (2), and *Silver* v. *Barnes*. (3) In each of those three cases a society bearing some similarity to the present was referred to as a partnership, but it was referred to as such for a different purpose, and not, I think, with a view of founding upon it any decree for dissolution, or any relief such as is usually given in partnership cases. It has been pointed out in Lindley on Partnership, in the passage which Mr. Rowden referred to, that the use of the word "partnership" in connection with those societies was really a misuse of the term, and I quite agree with that, if I may say so respectfully. I think they are not partnerships either within the definition of the Partnership Act of 1890 or within the general acceptation of the word "partnership." But does the jurisdiction of the Court to deal with funds vested in a number of persons for their joint benefit depend on its

(1) 6 Ves. 773. (2) 3 V. & B. 180.
(3) 6 Bing. N. C. 180.

WARRINGTON J.
1904
LEAD COMPANY'S WORKMEN'S FUND SOCIETY, *In re.*
LOWES *v.* GOVERNOR AND COMPANY FOR SMELTING DOWN LEAD WITH PIT AND SEA COAL.

being shewn that that number of persons constitute what is properly and technically partnership? That is where I differ from the argument which has been presented to me by Mr. Rowden. Under what particular jurisdiction one may put it is perhaps rather difficult to say; but it seems to me that where you have, as you have in the present case, funds which belong to a number of persons who have individually certain interests therein regulated either by a trust deed, or, as in the present case, by a body of rules, and especially where, as in the present case, you find those funds are vested in trustees for the members of that society, then I think the Court has jurisdiction to interpose. If it finds that the interests of those to whom the funds belong cannot be carried into effect modo et forma as they have at other times determined amongst themselves they shall be divided, then I think the Court has power to interpose and say that justice cannot be done by allowing these rules to go on as they have gone on hitherto, because if that is allowed certain members of the society will get benefits to which, as between themselves and the other members, they were never entitled, and the only way in which justice can be administered on equitable principles will be to endeavour to do the best one can to give to each member of the society that interest in the funds to which he is justly entitled, and that can only be done by winding up the society. It seems to me, therefore, on that ground I must make an order for the winding-up of the society and its affairs, and for the distribution of the fund among the persons beneficially interested therein.

Now with regard to authority I can find no case (and no case has been cited to me on either side) which tends to shew that I have no jurisdiction such as I am minded to assume. On the other hand, no case has been cited directly shewing that I have such jurisdiction; but I have had one case cited to me of *Pearce* v. *Piper* (1), in which I think it is clear, when the case is carefully examined, that the Lord Chancellor assumed, and acted upon the assumption, that he had jurisdiction to deal with the fund in a case very much like the present. In that case there was a society called "The Amicable Society of

(1) 17 Ves. 1; 11 R. R. 1.

Master Bakers." It had been established in the year 1798 under certain articles of agreement which I need not read in detail, but they were very much like the rules in the present case. It is sufficient for me to say that it was a society established for the purpose of raising a fund to provide certain annuities for superannuated workmen and to provide sick pay. There the society had got into difficulties very much as the present society has, and the Master of the Rolls, before whom the matter came, at the suggestion of the plaintiffs, dealt with it in this way. Unlike the plaintiffs in the present case, they did not claim a dissolution, but claimed to have the society continued, and to have directions given which would ensure their funds and so enable them to go on; and the Master of the Rolls, in compliance with the prayer of the plaintiffs, made a decree for an account against the trustees, and directed an inquiry to ascertain what was due to the plaintiffs for arrears of their annuities, and to have the produce of the fund applied in payment of the annuities, and if the subscriptions and the rents and produce of the fund were not sufficient to provide the annuities in full, then to have the subscriptions increased. That was appealed from to the Lord Chancellor. There had been a resolution in that case apparently of a majority to dissolve the society, and the prayer of the petition of appeal insisted: "That the bill should be dismissed, that the resolution to dissolve the society was proper; and that a Court of Equity ought not to lend its aid, and give effect and duration to an undertaking founded in mistake; and the consequences of which must inevitably involve in ruin many of the parties." It will be observed, therefore, that the appellants desired that the undertaking should be ended, and the respondents, supporting the decree of the Master of the Rolls, wanted to have it continued. It is a little difficult to follow the case throughout because it extended over many days, and there are detached bits of judgment, some on one day and some on another; but at the very end we find the Lord Chancellor saying (1): "This society will be sensible, that it is much more easy for them, than for the Court, to arrange this." What he means,

(1) 17 Ves. 19; 11 R. R. 8.

WARRINGTON J.

1904

LEAD COMPANY'S WORKMEN'S FUND SOCIETY, *In re.* LOWES *v.* GOVERNOR AND COMPANY FOR SMELTING DOWN LEAD WITH PIT AND SEA COAL.

I think, is to arrange their affairs generally. "If they cannot agree on some plan, I must refer it to the master to make similar inquiries to those directed by Lord Thurlow; taking the assistance of a calculator: and to inform me, if this society cannot longer exist, what will be an equitable distribution of the fund subscribed." Then he says: "But that course is not to be taken, unless the Court shall be unable to do more justice by securing to those, who have and may become entitled to annuities, the enjoyment of them." I think it is clear that the Lord Chancellor considered that if, as he says, the society could not longer exist, the proper course was, after having obtained the advice and the assistance of the master and of a calculator, to make an equitable distribution of the funds that had been subscribed. It will be observed that he inserts one caution, namely, that that course is not to be taken unless the Court is unable to do more justice. The Lord Chancellor, therefore, does, I think, in that case provide me with an authority sufficient to enable me to pronounce the judgment which I am asked to make. I may say that on the evidence I come to the conclusion that the Court is unable to do more justice by securing the annuities than by making a distribution of the fund. I think, therefore, I must pronounce a judgment declaring that the affairs of the society ought to be wound up by, and under the direction of, the Court, and that the rights of all parties beneficially interested in the funds of the society ought to be ascertained, and the funds distributed amongst the members of the society accordingly.

[Upon the application of the plaintiffs and with the consent of all parties his Lordship also appointed new trustees of the fund, and directed the company to transfer the assets to them forthwith.]

The matter was thereupon referred to chambers to have a scheme settled for the division of the fund, with a general liberty to apply in chambers for a distribution of the assets on a scheme being settled. The actuary, to whom the matter was referred to settle a scheme, having some doubts as to the

principle on which the amounts payable to the various members ought to be calculated, and there being also some difficulty, on the ground of expense and otherwise, as to the service of notice of this judgment in consequence of the number of members to be served, the case was subsequently brought before the judge in chambers on these two points.

WARRINGTON J., after hearing counsel for the pensioners and non-pensioners, considered the present case to be one of resulting trust somewhat similar to that of *In re Printers and Transferrers Amalgamated Trades Protection Society* (1), and made an order to the following effect:—

That the scheme of distribution of the society's funds is to be settled upon the principle of a return to the members of the society as existing on May 1, 1904, of their contributions, including fines on admission, but irrespective of fines or payments in respect of sick pay or weekly allowances or other benefits, and without interest.

In dispensing with service of notice of the said judgment of May 9, 1904, upon members of the society who were not parties to the action, the order directed that instead thereof advertisements be published in the *London Gazette*, *The Times*, and certain local newspapers, giving notice of the said judgment, and of the proposed scheme for the division of the trust moneys, and of the date when the same would be settled, and that a copy of the said judgment and of the proposed scheme be sent by post to all members whose addresses were known to the plaintiffs' solicitors.

Solicitors: *Ridsdale & Son, for W. J. & H. C. Watson, Barnard Castle; Clarke, Rawlins & Co.*

[The reporter is indebted to the plaintiffs' solicitors for the information as to the proceedings in chambers.]

(1) [1899] 2 Ch. 184.

W. C. D.

C. A.
1904
June 7, 10.

In re HOARE & CO., LIMITED AND REDUCED.

[00105 of 1904.]

Company—Reduction of Capital—Sanction of Court—Lost Capital—Reserve —Apportionment of Loss—Companies Act, 1877 (40 & 41 *Vict. c.* 26), *s.* 3.

Under the Companies Act, 1877, the capital of a company may be reduced if any capital (1.) has been lost, or (2.) is unrepresented by available assets.

The directors of a company were empowered by the articles of association to create a reserve fund out of the profits of the company for such purposes as they should think conducive to the interests of the company, and to employ the reserve fund in the business of the company without being bound to keep the same separate from the other assets. The company had built up a reserve composed partly of premiums received for leases, partly of premiums received on the issue of preference shares, and partly of ordinary business profits. The reserve was used in the company's business, and was not kept separately invested. The company had incurred a loss arising from the depreciation in the value of its public-houses below the amount stated in the company's balance-sheet. The company accordingly applied for the sanction of the Court to a scheme for reduction of capital whereby the company, while retaining a small portion of the reserve, attributed to the reserve more than its rateable proportion, and to the capital account less than its rateable proportion, of the loss :—

Held (reversing the decision of Buckley J.), that, the reserve having been properly created out of profits, in ascertaining the amount of capital lost, the loss of assets ought to be treated as rateably apportioned between the reserve and the capital account, and that, in the absence of special circumstances, the company in proposing a scheme for reduction of capital was not bound to wipe out the whole of the reserve, or to attribute to it more than its due proportion of the loss, though it might do so if it chose ; and the Court sanctioned the scheme.

The decision of Cozens-Hardy J. in *In re Barrow Hæmatite Steel Co.*, [1900] 2 Ch. 846, explained.

Appeal from the refusal of Buckley J. to sanction a scheme for reduction of capital.

The petitioning company, Hoare & Co., Limited, was incorporated in 1894 under the Companies Acts, 1862–1890, for the purpose of taking over the business of brewers theretofore carried on by the firm of Hoare & Co.

The original capital of the company was fixed at 1,000,000*l.*, divided into 60,000 preference shares of 10*l.* each, 36,000

preferred ordinary shares of 10*l*. each, and 4000 deferred ordinary shares of 10*l*. each. The capital of the company had since been increased to 1,950,000*l*. by the creation of 20,000 additional preference shares of 10*l*. each, and 75,000 new shares called "A cumulative preference shares" of 10*l*. each to rank next after the 80,000 existing preference shares. All the shares were fully paid up.

The articles of association of the company authorized the company (clause 53) from time to time by special resolution to reduce its capital by paying off capital or cancelling capital which had been lost or was unrepresented by available assets, or reducing the liability on the shares or otherwise as might seem expedient. By clause 119 the directors were empowered (amongst other things), "(viii.) Before recommending any dividend, to set aside out of the profits of the company such sums as they think proper as a reserve fund to meet contingencies, or for equalizing dividends, or for repairing, improving, and maintaining any of the property of the company, and for other purposes as the directors shall, in their absolute discretion, think conducive to the interests of the company, and . . . . to invest the several sums so set aside upon such investments as they may think fit, and from time to time deal with and vary such investments, and dispose of all or any part thereof for the benefit of the company, and to divide the reserve fund into such special funds as they think fit, and to employ the reserve fund or any part thereof in the business of the company, and that without being bound to keep the same separate from the other assets."

The company had since its incorporation built up a reserve of 292,612*l*. 18*s*. 1*d*., made up as follows: premiums received for leases, 48,737*l*. 18*s*. 1*d*.; premiums received on issue of preference shares, 252,000*l*.; general reserve fund, 50,000*l*., these two last items being subject to a deduction of 58,125*l*. in respect of dividends paid on the preference and A preference shares to October 7, 1903. The general reserve fund consisted of undistributed profits accumulated since 1896. The reserve fund was used in the company's business, and was not kept separately invested. The company had recently caused a

C. A. 1904

HOARE & Co., LIMITED AND REDUCED, *In re.*

valuation to be made of its brewery premises, public-houses, and loans, and ascertained that those items were of less value than the amount at which they stood in the company's balance-sheet by the sum of 591,707*l.* 13*s.* 10*d.* It was proposed to deal with this loss as follows: 396,000*l.* to be written off by extinguishing a corresponding amount of the preferred ordinary shares and deferred ordinary shares, and 195,707*l.* 13*s.* 10*d.* to be met by writing off the like amount part of the reserve fund of the company. At extraordinary general meetings of the company, held on March 25 and April 12, 1904, special resolutions were unanimously passed and confirmed for the reduction of the capital of the company to 1,554,000*l.* by cancelling the whole of the preferred ordinary shares and 9*l.* per share of the deferred ordinary shares, thus reducing them to shares of 1*l.*; and resolutions were passed and confirmed at the same meetings for altering the articles of association by making them accord with the altered capital, and removing certain restrictions with respect to the voting powers of the holders of preference and A preference shares. These resolutions were unanimously approved at separate general meetings of the preference shareholders and the A preference shareholders.

The company presented a petition to obtain the approval of the Court to this reduction of capital. Buckley J. refused to sanction the scheme upon the ground that the whole of the reserve fund ought to be taken into account in ascertaining the amount of loss which had to be written off. That appeared to him to be right on principle; and he also thought that the point was concluded by the decision of Cozens-Hardy J. in the case of *In re Barrow Hæmatite Steel Co.* (1) That case was subsequently affirmed by the Court of Appeal (2); but in the view which the Court took of the case it was not necessary to consider the point. He therefore dismissed the petition.

The company appealed. The appeal came on for hearing on June 7.

Neville, K.C., Eve, K.C., and *Martelli,* for the company. The question turns on the construction of s. 3 of the Com-

(1) [1900] 2 Ch. 846. (2) [1901] 2 Ch. 746.

panies Act, 1877 (40 & 41 Vict. c. 26), which provides that the power to reduce capital conferred by the Companies Act, 1867, "shall include a power to cancel any lost capital, or any capital unrepresented by available assets." Buckley J. has held that a company cannot reduce its capital at all if it retains any reserve fund—that the reserve fund must be exhausted in making good the loss before there can be any reduction. He has in effect held that the words "capital unrepresented by available assets" are explanatory of the prior words "lost capital." It is submitted that the two expressions are alternative, and that there is power to reduce either "lost capital" or "capital unrepresented by available assets." In the present case it is clear that capital has been lost. Suppose a manufacturer earns profits in his business and places the amount earned in a savings bank, and then his factory is burnt down. The fund in the bank might be sufficient to cover the loss; but could it be said that he had not lost capital by the fire? The placing of profits to a reserve fund does not capitalize them; they still remain profits which can be dealt with as such.

The reserve fund in the present case is derived in part from premiums on the issue of preference shares, and Buckley J. held that those premiums were not "profits" in the strict sense of the word. That is a very inconvenient construction, and it is submitted that it is wrong. The premiums are in the nature of a windfall; the capital of the company is not increased by them, and they are really "profits." The existing assets of the company represent both capital and reserve fund, and it is submitted that the reduction ought to be made rateably, and that is what it is proposed to do. The present point has not yet been decided by this Court. In *In re Direct Spanish Telegraph Co.* (1) Kay J. sanctioned a reduction of capital, where there was a reserve fund which it was proposed to retain; but the point does not appear to have been argued. In *In re Barrow Hæmatite Steel Co.* (2) Cozens-Hardy J. expressed an opinion that in ascertaining the available assets of a company for the purpose of a reduction of capital, the amount of a reserve fund must be taken into account, and, on

(1) (1886) 34 Ch. D. 307. (2) [1900] 2 Ch. 846.

C. A. 1904 HOARE & Co., LIMITED AND REDUCED, *In re.*

the ground (inter alia) that this had not been done, he refused to sanction a proposed reduction of capital. His decision was affirmed by the Court of Appeal (1), but merely on the ground that the alleged loss of capital had not been proved. The Court expressed no opinion on the other point.

[ROMER L.J. I doubt whether the Act applies to the reserve fund. It is not capital. The balance of the loss only represents lost capital; the reserve fund has lost a part of the assets which represented it.

COZENS-HARDY L.J. Did my decision in *In re Barrow Hæmatite Steel Co.* (2) go further than that?]

Part of the reserve fund must be written off, not because of the provisions of the Act, but because the assets represent in part the reserve fund and in part the capital of the company.

[VAUGHAN WILLIAMS L.J. If the reserve fund has not ceased to be available for dividend it is not capital. Could the directors be restrained by injunction from applying it to payment of dividend?]

There has been no loss on the trading in the present case; it is only a capital loss. The Companies Act only requires that the capital shall be kept intact; anything beyond that is gross profit.

VAUGHAN WILLIAMS L.J. said that the Court could not dispose of this appeal without further information as to the circumstances under which this reserve fund, and especially that part of it which represented premiums on preference shares, was created, and the appeal was adjourned till June 10 to obtain that information. Accordingly the chairman of the company filed a further affidavit which was to the following effect:—The first carrying to reserve fund of premiums on preference shares took place in June, 1896. Seventy thousand pounds was then received on the issue of 20,000 preference shares and was immediately carried to reserve, but no formal resolution of the directors to that effect was passed. However, by the report submitted to the annual general meeting held on August 10, 1896, it was stated that the whole of these

(1) [1901] 2 Ch. 746. (2) [1900] 2 Ch. 846.

premiums had been carried to reserve, and this amount was shewn in the balance-sheet, and the report and balance-sheet were unanimously approved at the general meeting. The balance of the reserve fund under this head was received in July, 1897, on the issue of the 75,000 10*l.* A preference shares, and by the terms of the prospectus it was agreed that the premiums should be carried to reserve. In the report presented to the next ensuing general meeting it was stated that these premiums had, in accordance with the terms of the prospectus, been added to the reserve, and the report and the accompanying balance-sheet were unanimously adopted at that meeting; but there was no formal resolution of the directors that these premiums should be so carried to reserve.

June 10. After this affidavit had been read, their Lordships sanctioned the scheme.

ROMER L.J., by request of Vaughan Williams L.J., delivered the first judgment. He said:—The only question which we have to consider in this case is one of principle, or, it may be called, one of law—namely, whether the Court has jurisdiction in such circumstances as arise here to sanction the scheme for the reduction of capital which is before us, owing to the loss that has occurred on capital account. I think we have jurisdiction. The question arises in a case where there was a reserve fund properly set apart by the company under the provisions of their articles. That reserve fund was a fund which at the time at which it was created arose from the fact that there were available assets (after deducting all liabilities of every kind, including the amount which is represented by the share capital) which might have been applied as the company thought fit without thereby doing any violence to the provisions of the Companies Acts or to the articles of the company. In other words, the surplus which was carried to the reserve fund represented that which might have been properly applied at the time, if the company had so thought fit, in paying further dividends to the shareholders, and no person could have complained if they had done so. It was, therefore, a

C. A. 1904

HOARE & Co., LIMITED AND REDUCED, *In re.*

Romer L.J.

reserve fund properly created, and that reserve fund could subsequently have been dealt with by the company in accordance with the provisions of the articles as they thought fit. They might have utilized it in equalizing dividends, or, if they had chosen, they might have applied it in making good lost capital, or have applied it to any purpose they thought fit within the objects of the company. Now what does such a fund as that represent? To my mind it in no wise represents the capital account properly so called. Test it in this way. In this case the company might, if they thought fit, have taken assets, and set them apart to represent the reserve fund, and might have kept those assets wholly apart from all the other accounts of the company. They might have kept the assets representing the reserve fund strictly to answer that reserve fund, and not have dealt with them in any way as part of the general assets of the company. So long as they did that, it is clear to my mind that the reserve fund could not be properly called in itself a capital asset. But in this case the company did what they had power to do, and what is often done in similar cases, namely, they did not set apart special assets to represent the reserve fund, but they allowed the matter to rest in account, and the assets generally to be dealt with by the company in the ordinary way of business, whether those assets might be said so far to represent the reserve fund, or whether they represented the capital account and the other liabilities of the company. Now what happened in that state of things was this. After some subsequent trading it was found that there was a great loss of assets—so great that after taking the liabilities properly so called of the company, apart from the reserve fund and the capital account, there was insufficient to pay the reserve fund and to meet the capital liability. In that case, what ought to be done with regard to the loss? Ought it to be attributed wholly to the capital account, or wholly to the reserve fund, or ought it to be treated as apportioned? In my opinion, under the circumstances of this case, the loss ought to be treated as apportioned between the reserve fund and the capital account properly so called—that is, the share capital. In the present case the company propose to do more

than that. They propose to attribute a larger proportion of the loss of assets to the reserve fund than they do to the capital account. In my opinion that was a thing which they were not absolutely bound to do, but which they certainly had a right to do; and so far, I think, no complaint can be made of their not wiping out the whole of the reserve fund, but treating a certain part of the assets as representing the reserve fund as written down by them. That leaves a certain amount of assets to represent the share capital after deducting the ordinary liabilities of the company—that is to say, the current debts and the debenture stock, and so forth. Then when one sees what assets there are to meet the share capital it is clear there has been a great loss of the capital; and accordingly we are asked, under the Act of Parliament, to sanction a scheme for the reduction of the share capital. In my opinion the Court has jurisdiction to deal with a scheme so framed, and to sanction it if it thinks fit. I quite agree that the Court is not bound in such a case as this to sanction the scheme. I can well understand cases in which the Court might refuse to sanction any reduction of the capital so long as the company kept anything by way of reserve fund. But undoubtedly, to my mind, the Court has jurisdiction to sanction a scheme whereby a proper part, as indicated previously by me, of the reserve fund is allowed to exist; and in the circumstances of this case I think that the Court ought to allow the small proportion of the reserve fund which, according to the scheme, it is proposed to keep to remain as a reserve fund. I will only add that in this case there is no question as to the rights of creditors, and it is a case where all the shareholders are unanimous in approving of the scheme.

VAUGHAN WILLIAMS L.J. I asked Romer L.J. to deliver judgment first, because in a matter of this sort I knew that he would put it much more clearly than I could myself; but at the same time I consider it is my duty to state for myself the principle upon which I understand we are acting in the present case. Now the particular statute under which we are acting is the Companies Act, 1877, and we have to see, before

C. A. 1904

HOARE & CO., LIMITED AND REDUCED, *In re.*

Vaughan Williams L.J.

we can sanction this reduction of capital, whether the case comes within the words of the 3rd section of the Act—that is to say, whether there is any lost capital or any capital unrepresented by available assets. I regard those two things as alternatives, and not as if the latter were exegetical. We have to see whether there is any lost capital, and to what extent. The difficulty which Buckley J. felt in this case was that he was not satisfied that there was lost capital to the extent which was alleged in the petition, and his doubt arose from the existence of this reserve. I do not use the words "reserve fund" because it is not true, in fact, to say that there was any reserve fund at all. If there had been any reserve fund in this case, and if the reserve fund was a fund which appropriated this sum which might be paid in dividends, but which the company did not think it prudent to distribute in dividends at the moment, but chose to retain in hand ready to distribute in dividends if they thought fit, unless the company by a proper resolution determined to do otherwise with it, I should have said that under such circumstances, in the event of a loss arising such as has occurred in this case, namely, by the reduction of the market value of the tied houses, the whole of that loss was a loss which for the purpose of this statute ought to be written off capital properly so called entirely. We really have not to decide that in this case, because the facts do not raise such a case. But I want to say before leaving that point that, however much capital you have lost at any given date, if your profit and loss account shews a profit balance, then to the extent of that profit balance you are entitled to distribute that money as dividend notwithstanding the fact that you have lost capital which you have not replaced. Under these circumstances, so far as this undistributed money is to be considered, I think that even if it had arisen after the loss of capital, you could have appropriated it to the payment of dividend, and the whole of that loss then would be properly written off capital. When I heard Mr. Neville's argument the other day I thought he was arguing upon that basis, and I quite expected a resolution to have been produced relating to the action of the board shewing that there

had been some such appropriation. That is not the case here. What has been done is this. No fund has really been created. There has been no investment at all of this fund which might have been distributed as dividends. What has been done is exactly the same as if the balance of profit and loss, that is to say, the profit balance, had existed in sovereigns, and the directors had met together and had said, "We have such a sum that we could distribute now in dividends if we chose, but we think it wiser not to do so at present, and therefore we will carry this sum to a reserve." That is, to my mind, precisely the same as if they had said, "We will pour these sovereigns into the till." Now you have got those sovereigns in the till. It is not to my mind a true way of looking at those sovereigns to say, "Here is a fund consisting partly of these sovereigns and partly of the other items appearing upon the asset side of the balance-sheet, and we will treat the capital and the reserve as being two funds which are charged upon one security, that one security being the total of the assets, including therein all the asset side of the balance-sheet and the money which has been poured into the till." I do not think it would be right to regard the capital and that reserve fund as two funds charged upon one security. If it were so, and there was a loss, you get at the rateable proportion of the loss without any difficulty at all. Then if one cannot do that, what is the proper way of doing this? I suppose one has to say that although the sum undistributed has not been segregated from the circulating capital, but has been poured into the till, nevertheless the power of the directors to do with this money as they may think best in the interests of the company has not yet gone. Supposing, for instance, there had been no scheme for reduction at all, what could the company have done? Could they have distributed this sum as a dividend? Theoretically I think they could. But ought they to do so? I think not. Then, as I understand, our conclusion in the present case is that what, as commercial men managing a commercial undertaking, ought to be done is to distribute the loss in proportion to the figures of the share capital and the reserve fund. As I understand from the figures in the present case, although that has not been

C. A. 1904 HOARE & Co., LIMITED AND REDUCED, *In re.*

done, the departure has only been in the sense of attributing too large a proportion of loss to the reserve fund and too small a proportion of loss to the share capital. Under those circumstances, inasmuch as there has been an undoubted loss of capital in this case, and we think that loss has been properly allocated as a commercial matter between the share capital and the reserve fund, we may sanction this scheme.

COZENS-HARDY L.J. I agree. I think that the leading idea of Buckley J.'s judgment was that you cannot reduce capital unless you find that the capital has been lost, and is not represented by any fund whether it is in the nature of capital or income. I cannot read the Act in that sense. I think if you prove that capital has been lost you do not really want to consider whether it is unrepresented by available assets. Although capital may not be lost, it may still be unrepresented by available assets, and in that case there is power to reduce. We have to deal here with a large loss—that is to say, the net assets, after payment of debts, which represent the share capital and the reserve fund, are insufficient. How ought that to be dealt with? I adopt the view of Romer L.J. on that point. I think that if the assets ought to represent both the share capital and the reserve fund, and they are not sufficient to do so, the proper course is to attribute the loss rateably between them; or, in other words, that we should not be justified in saying that a larger amount of capital has been lost than would be the result of working out the proportion in that manner. No doubt the whole of this reserve fund might have been applied to make good this loss of capital. The directors propose to take more than its proportionate share, but to leave what I may call a moderate reserve fund. That being so, it seems to me we are entitled to say it has been established in the present case that capital has been lost, and lost to the extent to which it is proposed to be written off by this order.

I desire to say one word about the case of *In re Barrow Hæmatite Steel Co.* (1), a decision of my own which Buckley J.

(1) [1900] 2 Ch. 846.

referred to. In that case the reserve fund had not been taken into account at all. It was blended with the other assets, but not taken account of at all. I do not think that I meant to say more than this, that in considering the loss of capital, you must have regard to the fact that the assets include a reserve fund, but not separately invested. If my language goes further than that, I certainly desire to qualify it in the sense I have now mentioned.

[Upon the application of the appellants the Court, in exercise of the power conferred by s. 4, sub-s. 2, of the Companies Act, 1877, ordered that the further use of the words "and reduced" after the company's name might be dispensed with.]

Solicitors: *Sandilands & Co.*

H. B. H.

In re DOWSON AND JENKINS'S CONTRACT.

[1903 D. 2009.]

Principal and Agent—Scope of Authority—Power of Attorney—Power to sell Property belonging to Principal—Property held as Mortgagee—Mortgagee's Statutory Power of Sale—Power to give Discharge for Mortgage Money—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 21, *sub-s.* 4.

A power of attorney authorized the agent to sell any real or personal property then or thereafter belonging to the principal, and also to receive and give a discharge for any moneys then or thereafter owing to the principal by virtue of any security:—

Held, that it did not authorize the agent to sell property held by the principal as mortgagee under the mortgagee's statutory power of sale.

Decision of Kekewich J. affirmed.

Sect. 21, sub-s. 4, of the Conveyancing and Law of Property Act, 1881, which provides that the power of sale conferred by that Act upon mortgagees may be exercised by any person for the time being entitled to give a discharge for the mortgage money, refers to the executors, administrators, and assigns of the mortgagee, and does not extend to a person entitled to give a discharge as agent.

APPEAL from a decision of Kekewich J. upon a vendor and purchaser summons.

C. A. 1904

DOWSON AND JENKINS'S CONTRACT, *In re.*

The vendor, C. K. Dowson, was the transferee of a mortgage (in common form) of a freehold house in Bristol, and he had entered into possession, and his power of sale under the Conveyancing Act, 1881, had become exercisable. In September, 1903, the vendor, who resided in Canada, was in England, and instructed his solicitors to put up the mortgaged property for sale by auction, but before the arrival of the day fixed for the sale he was obliged to go to Canada. Accordingly, on September 22 he executed a power of attorney. This instrument followed the form in Prideaux's Precedents in Conveyancing, 18th ed. vol. ii. p. 827 ("No. 1—Power of Attorney from a person going abroad"). It contained extensive powers of management, with power "to ask, demand, sue for, recover, and receive all sums of money, goods, effects, and things now or hereafter owing or payable or belonging to me by virtue of any security or upon any balance of accounts or otherwise howsoever . . . . and to give, sign, and execute receipts, releases, and other discharges for the same respectively." It also contained a power "to sell any real or personal property now or hereafter belonging to me by public auction or by private contract, and subject to any conditions as to title or otherwise," and a power to invest the proceeds of sale in the securities therein mentioned. The power of attorney, however, contained no reference to the impending sale, and no special authority for realizing property held by the vendor as mortgagee.

On September 23 the vendor left England. On September 24 the mortgaged property was sold at the auction by the vendor's attorney to Eliza Jenkins. The contract of sale, which contained no special conditions as to the power of attorney, was signed by the purchaser and by agents acting for the attorney. The purchaser by her requisitions objected that the power of attorney was insufficient to authorize the sale of property held by the principal as mortgagee, and required either that the conveyance should be executed by the vendor personally, or that a fresh authority should be obtained from him. The vendor being unwilling to comply with this requisition, the purchaser took out this summons to determine the validity of

the objection. Kekewich J., upon the construction of the whole of the power of attorney, came to the conclusion that it did not authorize the sale by the attorney of property held by the principal as mortgagee.

The vendor appealed.

Sherrington, for the appellant. The dates of the power of attorney and the sale may be looked at as affording evidence of the scope of the agency.

Admitting the principle of construction of powers of attorney laid down by Lord Macnaghten in *Bryant & Co.* v. *La Banque du Peuple* (1), this sale comes within the express words conferring "power to sell any real or personal property now or hereafter belonging to me."

This power is expressed in popular and not technical language. Once the power of sale has arisen, the mortgaged property of which the mortgagee is in possession is "real property belonging to the vendor." He has rights of property over it. For instance, a judgment creditor of the mortgagee could have it sold under a writ of elegit: see 1 & 2 Vict. c. 110, s. 11.

[COZENS-HARDY L.J. A judgment creditor could not exercise the power of sale in the mortgage.]

No. But the sheriff could seize the mortgaged property as land over which the judgment debtor (the mortgagee) has a power of disposition exercisable for his own benefit without the assent of any other person.

When the mortgagee sells he transfers the legal estate, not by means of a power, but by virtue of his legal ownership: see *In re Harwood* (2), per Cotton L.J. What is called a power of sale in a mortgage is nothing but an authority to defeat the equity of redemption. When that authority has arisen the right of sale is an incident of ownership. That is the reason why a mortgagee in selling is held not to be a trustee.

If the rights of the mortgagee to dispose of the mortgaged premises do not constitute them his property, an implied authority to sell them can be inferred here within the four corners of the power of attorney.

(1) [1893] A. C. 170, 177. (2) (1887) 35 Ch. D. 470, 472.

C. A. 1904

DOWSON AND JENKINS'S CONTRACT, *In re.*

The mortgage debt is clearly personal property of the vendor, and can be transferred by the attorney together with the premises as ancillary to the debt. Then by the Conveyancing Act, 1881, s. 21, sub-s. 4, the transferee could himself exercise the power of sale. Surely the attorney can do what can be done by his assign.

The attorney has express power "to recover money owing to the vendor upon any security." The ordinary means of recovering a mortgage debt where the mortgagor cannot pay it is by sale.

Mark Romer, for the respondent. This is not real property belonging to the vendor. Express power should have been given to the attorney to sell property held by the vendor as mortgagee. If upon a sale there is a surplus in the hands of the attorney after satisfying the mortgagee, no provision is made for dealing with it.

[VAUGHAN WILLIAMS L.J. Can the attorney exercise the power of sale by virtue of the Conveyancing Act, 1881, s. 21, sub-s. 4, as the person entitled to receive the mortgage debt?]

No. "Entitled" means entitled by devolution or as assignee to the mortgage debt.

Sherrington, in reply. Here the attorney is empowered to give a receipt for any sum owing on security. Therefore he can give an effectual discharge for any surplus. Of such surplus he would ipso facto become a trustee, so that the vendor could not make any provision regarding it. If general words are to be of any use at all, they ought to be effective to cure such a technicality as this.

VAUGHAN WILLIAMS L.J. I think that we must affirm Kekewich J.'s decision in this case. It is a case in which, in one sense, one would be very glad to do otherwise, because if one looked at matters which really one is not entitled to look at one would know, as a fact, that this power of attorney was executed for the express purpose of enabling the attorney to do that which this Court is about to hold he has no authority to do. But legal certainty is a good thing, and generally you cannot have good without having the attendant evil. The law

says that these authorities must be strictly construed according to their terms, because the rights of other persons may be affected. Under these circumstances we have to look at this power of attorney to see if it gives power to sell this mortgaged property free from the equity of redemption. The words relied on are: "also to sell any real or personal property now or hereafter belonging to me by public auction or private contract, and subject to any conditions as to title or otherwise." These words are not wide enough, because if you are selling this property free from equity of redemption you are really selling, not only that which the principal giving the authority might properly describe as being his property, but also the mortgagor's equity of redemption. There is nothing sufficient, therefore, in those words. But the deed also contains a power "to receive all sums of money, goods, effects, and things now or hereafter owing or payable or belonging to me by virtue of any security or upon any balance of accounts or otherwise howsoever . . . . and to give, sign, and execute receipts, releases, and other discharges for the same respectively." We have been discussing the question whether those words giving the attorney authority to receive the debt were not sufficient to shew that under the Conveyancing Act, 1881, s. 21, sub-s. 4, the attorney having this power of giving receipts and discharges would also have the power of sale. The words of the sub-section are: "The power of sale conferred by this Act may be exercised by any person for the time being entitled to receive and give a discharge for the mortgage money." But we are of opinion that those words do not extend to everybody who has a power to give a receipt and discharge. The sub-section does not include a person who has that power merely as an agent, but is intended to apply only to those persons who are either mortgagees or have vested in them the property of the mortgagees, such as the executors. Therefore we are thrown back on the very terms of the deed. I find no passage in the deed which supplies the deficiency in these words—the absence, that is, of any reference to the exercise of the power of sale which is exercisable by the principal by virtue of the statutory authority in the Act of 1881.

C. A. 1904 — DOWSON AND JENKINS'S CONTRACT, *In re.* — Vaughan Williams L.J.

I may point out that really there was no difficulty in providing a power of attorney which should in plain terms have given this power to the attorney. The two alternatives suggested in Robbins' Law of Mortgages, pp. 891–2 (see Coote's Law of Mortgages, 7th ed. p. 907), appear to me to be quite effective. There might have been a general authority to the attorney to sell and transfer property held by his principal as mortgagee, or there might have been a special power of attorney to enforce the security by sale. Under these circumstances I am afraid that the principal made a mistake here in having this power of attorney framed as he did, and that he has not had it couched in sufficient terms to give the attorney the power which he intended to give; and inasmuch as other persons might be affected by the exercise of this power, I must hold that this power of attorney does not extend to authorizing the attorney to sell the mortgaged property and receive the purchase-money.

ROMER L.J. I am of the same opinion. By this power of attorney Dowson undoubtedly authorized the attorney to sell any real or personal property belonging to him. Now, so far as this power of attorney is concerned, was the property the subject of this case property belonging to Dowson? He held it subject to an outstanding valuable equitable estate in the mortgagor, and primâ facie a power to sell the real property belonging to Dowson would only authorize a sale subject to that equitable estate. But Dowson undoubtedly had a power of sale. That power of sale enabled him to sell so as to get rid of the equitable estate of the mortgagor. That power is really a power in Dowson to sell in substance the equitable estate of the mortgagor—at any rate, to destroy it for the purpose of the sale. Can that power be properly described as real property belonging to Dowson? I think not. I think that that view is borne out by the rest of the power; for when one inquires into the power to deal with the proceeds in the hands of the attorney, those provisions are strictly confined to money absolutely belonging to Dowson, and cannot extend to any money which may represent the equity of redemption—in other words,

the surplus money of the sale after discharging the mortgage debt and costs. Therefore I think that this sale was not within the power of attorney.

COZENS-HARDY L.J. I am of the same opinion. I should be sorry that there should be any doubt that a mortgagee can confer on an attorney the power of sale vested in him as mortgagee. On the other hand, it seems to me that a mere power of attorney enabling an attorney to sue for, recover, and receive money due on a mortgage is not in itself a power to do more than receive the money and execute the necessary transfer, and does not authorize the attorney to sell, not merely the mortgagee's interest in the property, but also the property freed from all right or equity of redemption on the part of the mortgagor. Can it be said that this power has done so? I cannot say that this particular property was real property belonging to the mortgagee. The mortgage debt was personal property belonging to him. But I cannot find on the face of this power of attorney anything which authorized the attorney to exercise the power of sale conferred on his principal by s. 19 of the Conveyancing Act, 1881. For these reasons I think that the decision of Kekewich J. was right, and the appeal must be dismissed with costs.

Solicitors: *Seymour Williams, for Lawrence & Co., Bristol; Robbins, Billing & Co., for Fairfax Spofforth, Bristol.*

H. B. H.

C. A.
1904
June 23.

In re ALLEN AND DRISCOLL'S CONTRACT.

[1903 A. 1699.]

Local Government—Paving Expenses—Charge of Expenses on Frontager's Property—Date from which Charge takes effect—"Completion of Works"—Vendor and Purchaser—Outgoings—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 150, 257.

The expenses incurred by a local authority for paving and other works executed by them under the provisions of s. 150 of the Public Health Act, 1875, first become, within the meaning of s. 257 of the Act, "a charge on the premises in respect of which they were incurred" as from the date of the completion of the works.

Decision of Byrne J., [1904] 1 Ch. 493, affirmed.

Tubbs v. *Wynne*, [1897] 1 Q. B. 74, distinguished.

Per Romer L.J.: *In re Highett and Bird's Contract*, [1903] 1 Ch. 287, explained.

APPEAL from the decision of Byrne J. (1)

The question was, at what date do the expenses incurred by a local authority for works executed by them under the provisions of s. 150 of the Public Health Act, 1875, become under s. 257 "a charge on the premises in respect of which they were incurred."

By an order dated July 22, 1903, the defendants were ordered to pay to the plaintiffs, on or before September 29, 1903, the sum of 4440*l.* in settlement of the purchase-money and interest due in respect of eleven leasehold houses situate in Rusthall Avenue, Acton, the plaintiffs by their counsel undertaking to make a good title to the leasehold premises, and to assign the same to the defendants, the defendants by their counsel undertaking to accept the leasehold houses so assigned in their present condition; and the plaintiffs were to receive the rents and to pay the outgoings in respect thereof up to September 29, 1903.

In February, 1903, a notice, under s. 150 of the Public Health Act, 1875, was served by the Acton Urban District Council upon the vendors to pave and make up the roadway in

(1) [1904] 1 Ch. 493.

front of the eleven houses. Default having been made by the vendors in complying with the notice, the district council, on July 7, 1903, entered into an agreement with a contractor for the execution of the works specified in the notice. The whole of the work specified in the notice was not completed by September 29, 1903, and the question arose between the purchasers and the vendors by which of them the expenses of the work ought to be borne. A summons under the Vendor and Purchaser Act, 1874, was taken out by the purchasers for the determination of this question.

Byrne J. held that the expenses became under s. 257 a charge on the property from the date of the completion of the works, and not before, and consequently that the purchasers must bear the expenses. The purchasers appealed.

W. H. Cozens-Hardy, for the purchasers. It is submitted that under s. 257 of the Public Health Act, 1875, the expenses became a charge on the property either at the date of the contract entered into by the local authority for the execution of the works—that is, July 7, 1903—or at any rate as regards the expenses of each completed piece of the work at the date of its completion. The expenses were "incurred" by the local authority either when they entered into the contract for the execution of the works, and thus became liable to pay for them, or, as regards each instalment of the contract price paid to the contractor, when that instalment was paid: *Tottenham Local Board of Health* v. *Rowell* (1); *West Ham Corporation* v. *Grant* (2); *In re Bettesworth and Richer*. (3) In *Stock* v. *Meakin* (4) the question arose under the Private Street Works Act, 1892, the language of which is not identical with that of the Public Health Act, 1875.

That a charge arose when money was actually paid by the local authority under the contract is shewn by *In re Highett and Bird's Contract*. (5) In that case the default in compliance with the statutory notice given by the local authority

(1) (1880) 15 Ch. D. 378, 392.
(2) (1888) 40 Ch. D. 331, 335.
(3) (1888) 37 Ch. D. 535.
(4) [1900] 1 Ch. 683.
(5) [1902] 2 Ch. 214; [1903] 1 Ch. 287.

C. A. 1904 ALLEN AND DRISCOLL'S CONTRACT, *In re.*

did not arise till after the date fixed for completion of the contract for sale of the property, and yet the Court thought the point arguable that the vendor might have to bear the expenses.

Again, on the construction of the order of July 22, 1903, it is submitted that the vendors have not shewn a good title to the property, there being at the time fixed for completion an inchoate liability which might ripen into a charge: *In re Highett and Bird's Contract.* (1) Moreover, this inchoate liability is an "outgoing," which under the terms of the order of July 22, 1903, the vendors were bound to pay: *Tubbs* v. *Wynne.* (2)

[COZENS-HARDY L.J. referred to *In re Boor.* (3)]

Norton, K.C., and *Ashton Cross*, for the vendors, were not called upon.

VAUGHAN WILLIAMS L.J. The question raised on this appeal is at what date did the expenses incurred by the local authority, under s. 150 of the Public Health Act, 1875, in the execution of paving and other works, first become, within the meaning of s. 257, a charge on the premises in respect of which they were incurred? There are other points in the case, but I will deal with them later. Byrne J. has held that these expenses first became a charge on the premises at the date of the completion of the works, and the appeal is from that judgment.

Now the date fixed in the contract of sale for completion was September 29, 1903, and in February of the same year a notice under s. 150 of the Public Health Act, 1875, to pave and make up the roadway in front of the houses was served upon the vendors by the Acton Urban District Council, and, default having been made in complying with the notice, the district council on July 7, 1903, entered into an agreement with a contractor for the execution of the works specified in the notice. The whole of the works specified in the notice were not completed by September 29—that is, by the date fixed for the completion of the purchase. That was the date up to which

(1) [1903] 1 Ch. 291. (2) [1897] 1 Q. B. 74.
(3) (1889) 40 Ch. D. 572.

the vendors were to receive the rents of the property and to pay the outgoings. Now it is common ground that the works mentioned in the notice had not been completed when the date fixed for the completion of the contract arrived. If the rule is that the charge created by s. 257 of the Act of 1875 does not arise until the completion of the specified works, then, apart from any question as to the meaning of the word "outgoings" in the order of July 22, 1903, it is plain that the vendors are not liable to bear these expenses, but the purchaser must bear them.

I do not propose to go at length into the cases upon this point. It is sufficient to say that I agree with Byrne J., not only that it was laid down in *Stock* v. *Meakin* (1) that the date when the charge arises is that of the completion of the works, but, further, that there is a series of cases, beginning with *Tottenham Local Board of Health* v. *Rowell* (2) and ending with *Surtees* v. *Woodhouse* (3), in which the same thing is laid down.

Mr. Cozens-Hardy has said, and I think to a certain extent he was right, that the question of the date at which the charge takes effect did not expressly arise in any one of those cases. But it seems to me that in each of those cases, and certainly in *Stock* v. *Meakin* (1), it was essential to that which the Court had to determine to ascertain that date. In *Stock* v. *Meakin* (1) the suggestion being that the charge did not attach until what was called in the Act then in question the "final apportionment" of the expenses among the owners, it was held that that was not so, but that the charge arose at an earlier period. What was that earlier period? It was stated in the judgment of the Court of Appeal, which was delivered by myself, that the charge arose upon the completion of the works. We are bound by that decision, and in my opinion it was quite right.

Mr. Cozens-Hardy has suggested that when a notice to pave has been given by a local authority and the notice has not been complied with, and the local authority have, in the exercise of their statutory powers, entered into a contract for the execution

(1) [1900] 1 Ch. 683. (2) 15 Ch. D. 378.
(3) [1903] 1 K. B. 396.

C. A. 1904

ALLEN AND DRISCOLL'S CONTRACT, *In re.*

Vaughan Williams L.J.

of the works (as they are, under the statute, entitled to do in case the owner of the property upon whom the notice has been served does not avail himself of the opportunity of doing the works himself), the charge must arise from the moment when that contract is entered into by the local authority for the execution of the works. I think there is great difficulty in the way of such a construction. If for any reason the contractor could not perform his contract, and some one else was employed to complete it (it may be at a much larger expense), it would, I think, be impossible to work out the provisions of the Act of 1875 as to the creation of a charge, if it arose at the date when the local authority entered into the contract, or, if not then, as each portion of the work was completed—in other words, as each brick was delivered on the ground or used in building. It seems to me impossible that the Legislature could have intended such a state of things. The only practical way of working out the provisions of the Act is by saying that the charge takes effect on the completion of the works.

Two other points were taken by Mr. Cozens-Hardy. First, it was said that by their contract the vendors have undertaken to convey free from incumbrances and to make a good title, and that they could not do so unless they had cleared off this incumbrance, and it is said that there was an inchoate incumbrance on the property by reason of the notice not having been complied with. I do not agree. I think that the object of the notice is to give the owner an opportunity of doing the work himself, and if he does not do it within a limited time, then the local authority are empowered to do it. In my opinion there is no incumbrance of any sort or kind until the completion of the works.

Then as a last point it is said that these expenses were an "outgoing" which the vendors were bound to pay, because there was an inchoate liability from the moment of the service of the notice to do these paving works. In my opinion there was no liability, inchoate or otherwise, until the local authority had completed the works.

I wish to add a word about *Tubbs* v. *Wynne* (1) and *In re*

(1) [1897] 1 Q. B. 74.

Boor (1), which were cited as authorities for the proposition that after the service of the notice by the local authority there was such an inchoate liability as would throw on the vendors the obligation of discharging the property from the expenses of the works as being an "outgoing." Those cases appear to me to shew plainly the distinction between a case in which an order has been made by a magistrate under the Building Act to do certain works, and default has been made in obeying the order, and a case like the present case, in which there has been only a default in compliance with a notice served on an owner giving him an opportunity of doing certain works himself. In the former case it may well be said that the expenses of the works became a liability from the date of the magistrate's order, and therefore an "outgoing" which a vendor would be bound to discharge if the order was made before the date fixed for the completion of a contract for sale.

In my opinion the decision of Byrne J. was right, and the appeal should be dismissed with costs.

ROMER L.J. I agree with all that my Lord has said, as well as with what was said by Byrne J. They have dealt so fully with every part of this case that I do not desire to add anything to what they have said.

But in the course of the argument our attention was called to *In re Highett and Bird's Contract* (2), and, as I was a party to the decision of that case in the Court of Appeal, I wish to say a few words about it. The vendor's counsel in that case did not call our attention to the precise terms of the contract of sale, and certainly did not direct the attention of the Court to the fact that in the contract itself there was no express agreement by the vendor to shew a good title, and, so far as the Court was concerned (I can say certainly for myself), the arguments proceeded on the assumption that the vendor was in the same position as if he had expressly agreed to make a good title. The case was decided on that footing, and it is not to be taken as an authority for any case in which there is not an express contract by the vendor to make a good title.

(1) 40 Ch. D. 572. (2) [1903] 1 Ch. 287.

C. A. 1904 ALLEN AND DRISCOLL'S CONTRACT, *In re.*

COZENS-HARDY L.J. I agree. It seems to me that *Stock* v. *Meakin* (1) does really decide the point now raised. For, although it is true that that case arose under the Private Street Works Act, 1892, the judgment proceeded upon the basis that the charge created under that Act was similar to the charge under the Public Health Act, 1875. The Court of Appeal in giving judgment in that case said that it became necessary to consider from what date the charge took effect, and the decision was that the charge became effective only as from the date of the completion of the works.

I think the principle is this—that by s. 150 of the Public Health Act an option is given to the owner or occupier—either do the work yourself, or if you do not the local authority will do it.

There was nothing wrong in the non-performance of the work by the vendors. If they did not do it, the local authority had power to do it, and when the work was completed a charge on the property for the expenses for the first time arose. *Tubbs* v. *Wynne* (2) is quite distinguishable from the present case, for in that case there was a breach of a positive order by a magistrate that certain works should be done. There was nothing of that kind in the present case, and in my opinion it cannot be properly said that these expenses are "outgoings" which the vendors are by the terms of the order of July 22, 1903, bound to pay.

Solicitors: *T. Blanco White; Taylor, Willcocks & Co.*

(1) [1900] 1 Ch. 683. (2) [1897] 1 Q. B. 74.

W. L. C.

NORTH AMERICAN LAND AND TIMBER COMPANY, LIMITED *v.* WATKINS.

C. A. 1904 June 5, 6.

[1901 N. 1128.]

Limitation, Statutes of—Principal and Agent—Moneys remitted to Agent for Special Purpose—Action for Account—Express Trust.

APPEAL from Kekewich J. (1)

This action was brought to recover from the defendant the balance of certain moneys remitted to him for a special purpose, and not accounted for.

Kekewich J. held that the defendant was an express trustee for the company of the moneys so remitted to him, and that the Statute of Limitations was no bar to the action.

The defendant appealed.

Eve, K.C., and *Martelli*, for the appellant.

Upjohn, K.C., *Gore-Browne, K.C.*, and *Newton Crane*, for the respondents, were not called on.

THE COURT (Vaughan Williams, Romer, and Cozens-Hardy L.JJ.) dismissed the appeal, taking a somewhat stronger view of the evidence than that taken in the Court below, namely, that the defendant was an express trustee, and also fraudulent; and on this finding no argument on the Statute of Limitations (on which alone the case was reported) was addressed to the Court.

Solicitors: *W. Webb; Minchin & Co.*

(1) [1904] 1 Ch. 242.

W. C. D.

C. A. 1904 June 20, 21.

In re JOHNSTON FOREIGN PATENTS COMPANY, LIMITED.

In re JOHNSTON DIE PRESS COMPANY, LIMITED.

In re JOHNSTONIA ENGRAVING COMPANY, LIMITED.

J. P. TRUST, LIMITED *v.* THE ABOVE COMPANIES.

[1902 J. 418.]

Company—Debenture—Validity — Ultra Vires — Joint Debentures issued by three Companies—Joint and several Covenant to pay—Charge by Companies respectively on their several Undertakings and Assets—Proceeds applied in Part to use of each Company—Articles of Association—Construction—Power to raise Money "not exceeding Amount of Preference Share Capital."

Three companies, each of which had power to borrow money on the security of debentures, issued joint debentures, by which the companies jointly and severally agreed to pay to the holder the amount advanced by him, with interest thereon; and the three companies thereby respectively charged with such payments their several undertakings and all their present and future properties and assets. Each of the companies received a part of the proceeds of the debentures:—

Held, that, though it was ultra vires for any of the companies to charge its assets with money advanced to another company, yet, to the extent to which the money advanced had come to the hands of each company, the debentures constituted a valid charge upon the assets of that company.

Decision of Byrne J., that the debentures were entirely void, reversed.

The articles of association of a company empowered the directors to borrow any sum of money, not exceeding the amount of the preference share capital of the company, on the security of the property of the company by (inter alia) debentures. No preference share capital having been issued:—

Held, that this clause did not limit the amount which could be raised on the security of debentures.

APPEAL from an order made by Byrne J. in the above debenture-holders' action, upon a summons taken out by the liquidator of the above three companies, declaring that some debentures for 1000*l.* each issued by the three companies jointly were respectively invalid and void and ultra vires the defendant companies, and created no charge upon the assets of the defendant companies or any of them.

The three companies were separately incorporated, but each

C. A. 1904

JOHNSTON FOREIGN PATENTS COMPANY, LIMITED, *In re.*

JOHNSTON DIE PRESS COMPANY, LIMITED, *In re.*

JOHNSTONIA ENGRAVING COMPANY, LIMITED, *In re.*

J. P. TRUST, LIMITED *v.* THE ABOVE COMPANIES.

of them had the same persons as directors and the same secretary and occupied the same office. They were financed by a Mr. J. Y. Johnston, who was one of the directors.

In December, 1901, each of the companies was in want of money, and it was resolved to issue twenty-five first mortgage debentures of 1000*l.* each. A resolution for this purpose was passed by the directors of each company on December 23, 1901. The resolution passed by the directors of the Johnstonia Engraving Company was as follows:—

"Resolved, in conjunction with the Johnston Die Press Company, Limited, and the Johnston Foreign Patents Company, Limited, to create and issue twenty-five first mortgage debentures of 1000*l.* each, to be secured upon the joint property and assets, undertakings, and businesses of the three companies, to be repayable on or before June 30, 1902, with a bonus of 50*l.* on each 1000*l.* debenture, and to carry interest in the meantime at the rate of 6 per cent. per annum.

"And resolved that the debentures be in the form submitted to this meeting, and that the seal of the company be affixed to such debentures, and that such debentures be from time to time issued as and when applications are received for the same."

Similar resolutions mutatis mutandis were passed by the directors of each of the other companies.

Each of the debentures thus authorized was headed with the names of the three companies, and was in the following form:—

"No. Debenture Mortgage. 1000*l.*

"Issue by the above companies jointly of twenty-five first mortgage debentures of 1000*l.* each.

"Redeemable on or before 30th June, 1902, at 1050*l.* per debenture, and carrying interest in the meantime at the rate of 6*l.* per cent. per annum.

"The three above-named companies (hereinafter called the companies) jointly and severally agree to pay to to whom this debenture is issued or other the registered holder or holders for the time being hereof (all of whom are intended to be included in the expression 'the debenture-holder' when used herein) the principal sum of 1000*l.*, together with a bonus

C. A. 1904

JOHNSTON FOREIGN PATENTS COMPANY, LIMITED, *In re.*

JOHNSTON DIE PRESS COMPANY, LIMITED, *In re.*

JOHNSTONIA ENGRAVING COMPANY, LIMITED, *In re.*

J. P. TRUST, LIMITED *v.* THE ABOVE COMPANIES.

of 50*l.*, and also interest in the meantime at the rate of 6*l.* per cent. per annum, on the 30th day of June, 1902, or on such earlier day as the said several moneys may become payable in accordance with the conditions subscribed hereto.

"And the said three companies hereby respectively charge with such payments their several undertakings and all their present and future properties and assets.

"And it is hereby declared that this debenture is issued upon and subject to the conditions subscribed hereto, which are to be deemed to be incorporated herein.

"Given under the common seal of the said several companies this 2nd day of January, 1902."

The debenture was sealed with the common seal of each company, the affixing of the seal being in each case attested by two of the directors and the secretary.

Among the conditions subscribed were the following:—

"(1.) This debenture is one of a series of debentures issued or about to be issued by the above companies for securing an aggregate principal sum of 25,000*l.*, such debentures being numbered 1 to 25.

"(2.) The debentures of the said series will all rank pari passu in point of charge without any preference or priority over one another.

"(3.) The charge hereby created shall be a floating charge.

"(4.) The moneys hereby secured shall in each of the events following become immediately payable:—

"(*a*) When default shall have been made in the payment of any moneys hereby secured.

"(*b*) When an order shall be made by any competent Court or an effective resolution shall be passed for winding up either of the companies.

"(*c*) When any process of execution or distress shall be levied on any of the property hereby charged, unless such process shall be satisfied within three days from the date of levy."

At a meeting of the directors of each of the companies held on January 2, 1902, the following resolution was passed:—

"Resolved, that all moneys received from the issue of

debentures recently authorized shall be paid into a special banking account, to be opened with the London City and Midland Bank, to be called 'The Johnston Companies' Debenture Account.' That from time to time as occasion arises the three companies shall be financed from the said account, but that every payment thereout shall be sanctioned in writing by the committee, consisting of Mr. Henry Pelham Clinton and any two of the undermentioned gentlemen" (whose names were given), "and that all cheques on the said account shall be signed by any two of the board of the three companies as at present constituted, and countersigned by the secretary, Mr. Percy Gray."

Mr. Henry Pelham Clinton was appointed manager of each company.

One of the debentures was issued to Mr. Pakeman, the solicitor of the companies, and six of the debentures were issued to Mr. H. J. Hadrill, one of the directors. The other debentures were all issued to other persons.

On March 11, 1902, Pakeman transferred his debenture to a company called the J. P. Trust, Limited.

In pursuance of the resolution of January 2, 1902, the 25,000*l.* the proceeds of the debenture, together with a sum of 1000*l.* advanced by Hadrill on the security of a debenture issued by the Johnston Foreign Patents Company, were paid into the special banking account authorized by the resolution of January 2, 1902. The sum of 26,000*l.* thus paid in was appropriated in the following manner—namely, 15,024*l.* 15*s.* to the purposes of the Johnston Foreign Patents Company, 6493*l.* to the purposes of the Johnston Die Press Company, and 2815*l.* to the purposes of the Johnstonia Engraving Company; making a total of 24,332*l.* 15*s.* The remainder of the 26,000*l.* was employed in the payment of commissions, expenses, and costs, and in the repayment to Johnston of loans made by him.

Each of the companies had power by its memorandum and articles of association to borrow money upon the security of debentures charged upon the property of the company.

The articles of association of the Johnston Foreign Patents

C. A. 1904 JOHNSTON FOREIGN PATENTS COMPANY, LIMITED, *In re.* JOHNSTON DIE PRESS COMPANY, LIMITED, *In re.* JOHNSTONIA ENGRAVING COMPANY, LIMITED, *In re.* J. P. TRUST, LIMITED *v.* THE ABOVE COMPANIES.

Company contained a clause (114) which provided that the directors might exercise all the powers of the company, except such as by the Acts, or by the articles, were required to be exercised by the company in general meeting, and that "the directors may do all acts and things which they shall consider proper or advantageous for accomplishing the objects or carrying on the business of the company, and may in particular, but without derogating from the generality of the foregoing powers, exercise the following powers (inter alia) :—

"(B) Sell, lease, license, mortgage, charge, or exchange any of the property of the company at such times and in such manner and on such conditions as they may think fit.

"(D) Borrow, or raise, or secure any sum or sums of money, not exceeding the amount of the preference share capital of the company, on the security of the property of the company (including cancelled capital, if any), or any part thereof, either by mortgage with or without power of sale, or of debentures or debenture stock or other security."

This company never issued any preference shares.

On March 12, 1902, this action was commenced by the J. P. Trust and Hadrill, on behalf of themselves and all other the debenture-holders of the three companies, against the three companies, to enforce the security created by the debentures.

On March 15, 1902, upon a motion by the plaintiffs for the appointment of a receiver, which was by consent treated as a motion for judgment, the Court by consent declared that the plaintiffs and other holders of joint mortgage debentures of the three companies were entitled to a charge upon the several undertakings of the companies, and all the present and future properties and assets of the companies, for securing the repayment of the principal moneys and interest in the debentures mentioned. And it was ordered that the usual accounts and inquiries should be taken and made, and a receiver was appointed.

On May 28, 1902, an order was made for the compulsory winding-up of the Johnston Foreign Patents Company.

On April 29, 1902, a similar order was made in the case of the Johnston Die Press Company, and on July 1, 1902, a

similar order was made in the case of the Johnstonia Engraving Company.

The official receiver was appointed liquidator in each case.

On August 6, 1903, the liquidator took out the summons on which Byrne J. made the order appealed from. The summons was addressed to the J. P. Trust and Hadrill, and the order declared their debentures to be void and ultra vires.

In the course of his judgment Byrne J. said: "Does a general power of borrowing given to a company and exercisable by the directors, under the terms to which I have referred, authorize the joining with other companies in borrowing a sum of money which is to be a joint borrowing and charged upon the whole of the undertakings of the three companies? I think not.

"It is said that in fact, although these debentures may not have been within the powers of the memorandum and articles, yet still there can be found upon the face of the debentures a sufficient intention of each company to charge its own property with a sum of 25,000*l.*, and that, there being this intention found, it is legitimate to treat the transaction in this way—that although inoperative to the whole extent, it has operated as a charge by each company on its property in respect of the moneys which that company received. For that authorities such as *In re Strand Music Hall Co.* (1) and others were referred to. But between that class of cases and the present case there appears to me to be this vital distinction—namely, that the transactions there intended to be carried out were intra vires, and that, although the means adopted for carrying out the bargain between the parties were in themselves illegal, yet nevertheless the Court, looking upon that as done which ought to have been done, would have regard to the substance of the contract between the parties, and hold them entitled as though lawful documents had been issued in pursuance of the original lawful contract. But in the present case the whole thing seems to me to stand or fall upon the question whether the transaction intended was a lawful transaction. For the reasons which I have given I have come to the conclusion

(1) (1865) 3 D. J. & S. 147.

C. A. 1904

JOHNSTON FOREIGN PATENTS COMPANY, LIMITED, *In re.*
JOHNSTON DIE PRESS COMPANY, LIMITED, *In re.*
JOHNSTONIA ENGRAVING COMPANY, LIMITED, *In re.*
J. P. TRUST, LIMITED *v.* THE ABOVE COMPANIES.

that the transaction was ultra vires, and that therefore the debenture-holders cannot rely upon their security in the winding-up."

The plaintiffs appealed.

Upjohn, K.C., and *Beddall*, for the plaintiffs. It is submitted that each of the companies having power to borrow money on the security of debentures, there is no objection to their borrowing the money jointly for their joint benefit. A trading company has an implied power to borrow money for its trading purposes, and the borrowing by the three companies jointly may have been the most advantageous mode of raising the money which each of the companies needed.

At any rate this was an honest transaction: each of the companies required money, and each has to some extent had the benefit of the money which was raised by the debentures. By the debentures each company severally agreed to pay the amount secured, and each company charged its own assets with the payment. Admitting that it was ultra vires to charge the assets of one company with the payment of money advanced to another company, it is submitted that the security is good as against each company to the extent of the money received by it. The Court will, to prevent injustice, carry out the intention of the parties so far as it can be legally effected; the only thing wrong is the machinery by which it was attempted to effect the borrowing money for the purposes of each company: *Roe* v. *Tranmarr* (*or Tranmer*) (1); Sheppard's Touchstone, 7th ed. vol. i. pp. 80–82. In substance there has been a separate borrowing by each company: *In re Strand Music Hall Co.* (2); *Blackburn Building Society* v. *Cunliffe, Brooks & Co.* (3) In that case a building society had no power to borrow money, and yet it was held that the bankers of the society, whose account was overdrawn, were entitled to hold title-deeds, which had been deposited with them by the society, as security for so much of the money advanced by them as had been applied in payment of debts and liabilities of the society properly payable.

(1) (1757) Willes, 682; 2 Wils. 75. (2) 3 D. J. & S. 147.
(3) (1882) 22 Ch. D. 61.

[ROMER L.J. referred to *Hawksley* v. *Outram*. (1)

VAUGHAN WILLIAMS L.J. referred to *In re Cork and Youghal Ry. Co.* (2)]

The principle of those cases applies here.

It has been objected that, by reason of art. 114 of the Foreign Patents Company that company had no power to borrow at all, because no preference share capital had been issued. But it is submitted that in that article the limitation means "the amount of the preference share capital, *if any*." The object of the limitation was only to protect the preference shareholders. And, if there are none, the protection is not required.

[They also cited or referred to *In re German Date Coffee Co.* (3); *In re Coolgardie Consolidated Gold Mines, Ld.* (4); *Stephens* v. *Mysore Reefs (Kangundy) Mining Co.* (5)]

Buckmaster, K.C., and *E. A. Nepean*, for the liquidator.

[VAUGHAN WILLIAMS L.J. We wish to hear you on the second point.]

It is submitted that the Court has to determine the purpose for which the debentures were issued. If that purpose was ultra vires and bad, it cannot be made good by the manner in which the money when raised was applied. The money was raised on the joint account of the three companies, and it might well be that one company would get the whole of it. The directors of each company whose assets were to be charged ought to have considered the necessity of raising money for it. There is no evidence that this was done. If the debentures were to be a good security so far as any of the companies had the benefit of the proceeds, the lenders would not know who had got their money or what assets were charged. The lender would suppose that he had a charge on the joint assets of the companies. There would be no charge on the separate assets of any company until that company had the benefit of some of the money. The money when raised was under the joint control of all the companies.

(1) [1892] 3 Ch. 359, 375.
(2) (1869) L. R. 4 Ch. 748.
(3) (1882) 20 Ch. D. 169.
(4) (1897) 76 L. T. 269.
(5) [1902] 1 Ch. 745.

C. A. 1904

JOHNSTON FOREIGN PATENTS COMPANY, LIMITED, *In re.*

JOHNSTON DIE PRESS COMPANY, LIMITED, *In re.*

JOHNSTONIA ENGRAVING COMPANY, LIMITED, *In re.*

J. P. TRUST, LIMITED *v.* THE ABOVE COMPANIES.

[ROMER L.J. That was done for the purpose of giving some of it to each company.]

There has been no separate lending to any of the companies; the lending was to the companies jointly, and then the money was applied by the directors. The directors only resolved to do that which was ultra vires.

[VAUGHAN WILLIAMS L.J. That was so in *Blackburn Building Society* v. *Cunliffe, Brooks & Co.* (1)]

In that case the money was employed in discharging existing debts of the society. At any rate, the debenture-holders are not entitled to any higher right than that of unsecured creditors; they are not entitled to hold the debentures as a security to any extent: *In re Wrexham, Mold and Connah's Quay Ry. Co.* (2); *Baroness Wenlock* v. *River Dee Co.* (3) The ground of the decision in *Blackburn Building Society* v. *Cunliffe, Brooks & Co.* (1) probably was that the creditors were bankers and as such entitled to a lien upon deeds deposited with them by their customer.

The issuing of the debentures in the present case was not only ultra vires; it was also a breach of trust on the part of the directors, who were trustees of their power to issue debentures, and Pakeman, who was a party to the breach of trust, can derive no title under it: *In re Lands Allotment Co.* (4) And Pakeman's transferee stands in no better position.

VAUGHAN WILLIAMS L.J. The official receiver, who is the liquidator of these companies, desires to have certain debentures, which had been issued by the three companies jointly, declared void and delivered up to be cancelled. Byrne J. has made an order to that effect, and we have to consider whether that order was right.

Before I refer to the debenture and what we find within its four corners, and the circumstances which have been brought to our notice by the liquidator, I will deal with a point which as regards one of the companies—the Johnston Foreign Patents Company—really overrides all other considerations. This

(1) 22 Ch. D. 61.
(2) [1899] 1 Ch. 440, 462.
(3) (1887) 19 Q. B. D. 155.
(4) [1894] 1 Ch. 616.

point arises upon art. 114 of that company. [His Lordship read art. 114, and continued :—]

It is said that inasmuch as at the time of the issue of these debentures no preference capital had been issued, the true meaning of Clause D is that, unless and until there is an issue of preference capital, the company is not to exercise its borrowing power at all, and that, when there is such an issue of preference capital, the power of borrowing is to be exercised only to an amount not exceeding the amount of the preference capital. If that were the true meaning, it would no doubt render the debentures as issued by the Johnston Foreign Patents Company ultra vires and void. But I do not agree in that construction of Clause D. Article 114 is prefaced with these words: "And the directors may do all acts and things which they shall consider proper or advantageous for accomplishing the objects or carrying on the business of the company, and may in particular, but without derogating from the generality of the foregoing powers, exercise the following powers." In the memorandum of association a power is expressly given to borrow and raise money on the security of debentures. I think we ought to construe Clause D in the light of those words in the preface, and also of the power given in the memorandum to borrow and to raise money. It is provided that Clause D is to take effect without derogation from the generality of the foregoing powers. In my judgment Clause D was introduced for the benefit and for the protection of the preference shareholders, and unless and until there are preference shareholders the protection is not wanted. I think the business understanding of this clause would be—You may issue debentures under the general powers given to you with no restriction except the express limits which are found in the earlier part of the articles and memorandum; but as soon as you issue preference share capital you must not issue debentures beyond the amount of that preference share capital, for unless the company holds out a security of that sort to the public whom they invite to come in as preference shareholders no one would come in at all. The meaning is—Avail yourself of your power to raise capital by debentures freely: that will be known

C. A. 1904

JOHNSTON FOREIGN PATENTS COMPANY, LIMITED, *In re.*

JOHNSTON DIE PRESS COMPANY, LIMITED, *In re.*

JOHNSTONIA ENGRAVING COMPANY, LIMITED, *In re.*

J. P. TRUST, LIMITED *v.* THE ABOVE COMPANIES.

Vaughan Williams L.J.

to all the world; but if you propose to use also the inferior security of preference shares as a means of raising capital, then from that time forward you must not issue debentures exceeding the amount of the preference share capital. In my opinion, therefore, this point fails.

I proceed to consider the debentures and the circumstances under which they were issued. I have no doubt upon the evidence that each of these three companies was in want of money, and, in the absence of any suggestion by the liquidator to the contrary, I am entitled to assume in want of money to be spent for intra vires purposes. They had debts and liabilities, and they desired to discharge them. Mr. Johnston had been in the habit of financing the three companies by lending money to each of them. The companies were pressed with their liabilities, and they applied to Mr. Johnston for assistance; but he was not in a position to make the advances which the companies had theretofore obtained from him. Thereupon a scheme was proposed for raising money to meet the liabilities of each of the companies by the issue of debentures. It was suggested that there would be a difficulty in issuing debentures by each company in respect of a separate advance made to it, because at the moment when the issue was proposed there was considerable uncertainty both as to the respective liabilities of the companies and also as to the property which belonged to each, their assets having been very much intermixed. Thereupon it occurred to the legal adviser of the three companies that it would be a good plan if, instead of three sets of debentures being issued by the respective companies, one set of debentures should be issued by the companies jointly.

Under these circumstances my conclusion of fact is, that the ultimate object in view by the three companies was the raising by each of them of money sufficient to meet the financial wants of each, but that, as a matter of machinery, it was thought better that the security should be given in a joint form. Under these circumstances the debentures were issued. The 25,000*l.* was substantially all raised at one moment and all lumped together for use. [His Lordship read the resolution

of the directors of January 2, 1902, as to placing the moneys raised to a special account.] In this way ascertained sums of money, varying in amount from over 15,000*l.* in one case to less than 3000*l.* in another, came into the coffers of the companies respectively.

The result is that each company got into its coffers from the pockets of the persons to whom the debentures were issued a sum of money; and in my judgment the 25,000*l.* ought to be treated as if it had been advanced by each of the lenders to the companies rateably in such a way that, if any one of the three companies was insolvent or unable to pay the amounts advanced by each individual debenture-holder, those amounts would be treated as divided rateably between the two solvent companies and the insolvent company. If the debentures were each for 100*l.* and two of the companies were solvent and the other was insolvent, each debenture-holder would be treated as having advanced 33*l.* 6*s.* 8*d.* to each solvent company and 33*l.* 6*s.* 8*d.* to the insolvent company. I can see no difficulty in doing perfect justice in that way. The ultimate result was an advance by each debenture-holder to each company to the extent to which his money went into the coffers of that company.

It is said that we ought to treat these debenture-holders as not being creditors of the companies at all, or that at any rate we should treat them as unsecured creditors. In this state of facts it seems to me impossible not to treat them as creditors of the companies. Upon the face of each debenture there is an admission of a debt of 1000*l.* That may not and will not be the right amount of debt in respect of each company, but it seems to me that, however much the machinery may have been misconceived, still there is, to the extent of the money which each debenture-holder has found for each company, a debt due by that company to him.

Assuming then that there is a debt, the next question is, Are these creditors who have advanced their money to these companies respectively to rank pari passu with the unsecured creditors, or do the debentures give them a security? I will assume, for the purpose of my present judgment, that it was

C. A. 1904

JOHNSTON FOREIGN PATENTS COMPANY, LIMITED, *In re.*

JOHNSTON DIE PRESS COMPANY, LIMITED, *In re.*

JOHNSTONIA ENGRAVING COMPANY, LIMITED, *In re.*

J. P. TRUST, LIMITED *v.* THE ABOVE COMPANIES.

Vaughan Williams L.J.

ultra vires for the three companies to issue the twenty-five debentures jointly. I must not be understood as saying that in my opinion in all cases in which companies for trading purposes, whether it be the purchase of goods or the raising of money, issue debentures jointly, the transaction would necessarily be ultra vires. I think this must depend upon the circumstances of each case. I need not decide that point now, but I will deal with this case upon the basis that this issue of debentures by the companies jointly was ultra vires. Now the debenture says this: "The three above-named companies jointly and severally agree to pay to the principal sum of 1000*l.*" with a bonus and interest. The covenant is joint and several, and if the several covenant had stood alone no one could have said that the debenture quâ that several covenant was void. But it is said that it is void because the several covenant is accompanied by the joint covenant. Then the debenture goes on—"and the said three companies hereby respectively charge with such payments their several undertakings and all their present and future properties and assets." The objection is that each company is charging its assets with moneys which are not coming into its coffers—moneys which, in the circumstances I have mentioned, it is plain were intended, to a certain extent, to go into the coffers of the other companies. The debenture is issued subject to some conditions which are set out, but I do not think they affect the present question. I assume that as a joint debenture this document is bad; but does that make it a totally void security? Each of the companies had power to borrow money to the extent that these moneys actually reached their coffers and for the purpose for which these moneys were intended to be and were in fact used. Are we bound to say that, because the debenture is void and ultra vires, in so far as it purports to make each company charge its property with and contract to pay the debts of the other two companies, yet the debenture may not stand good to the extent that it gives security for the separate debts which might be incurred by the companies respectively for the purpose of their own business? I do not think so. Bearing in mind the undoubted fact that these sums

of money have gone into the coffers of the companies respectively—that these moneys have come from the debenture-holders, and have been used by the companies respectively for their benefit for proper purposes, and used in such a way as to increase the assets of the companies, I do not think we ought to refuse to give effect to the debentures in so far as they create a security for sums borrowed within the powers of the companies respectively. I think that these sums were not the less borrowed by the companies intra vires because at the moment when they issued the debentures they intended to make themselves also responsible for moneys as to which they could not incur a responsibility without doing that which was ultra vires. Under the circumstances I think that, although undoubtedly each company purports on the face of the debenture to do that which for the purpose of my judgment I assume to be ultra vires, yet we ought to hold that the debentures are a good security for the moneys which have come from the pockets of the debenture-holders, and have been received and enjoyed by the companies respectively.

I will not discuss the authorities at any length, but I think the principle is very well stated in the judgment of Willes C.J. in *Roe* v. *Tranmarr* (*or Tranmer*). (1) In that case a conveyance was expressed to operate by way of release, but it could not do so because it attempted to grant a freehold in futuro, and the Court, gathering the obvious intention of the parties that the land should pass by the deed, thought that they were justified in carrying out that intention by holding that the release might operate as a covenant to stand seised to uses. Willes C.J. said (2): "Lord Hobart (who was a very great man) in his report (fo. 277) says, 'I do exceedingly commend the judges that are curious and almost subtil, astuti, (3) to invent reason and means to make acts according to the just intent of the parties, and to avoid wrong and injury which by rigid rules might be wrought out of the act;' and my Lord Hale in

(1) Willes, 682; 2 Wils. 75.

(2) 2 Wils. 78.

(3) The quotation in Willes, besides omitting the word "do" above, omits here these words: "(which is the words used in the Proverbs of Salomon in a good sense, when it is to a good end)." —F. P.

C. A. 1904

JOHNSTON FOREIGN PATENTS COMPANY, LIMITED, *In re.*

JOHNSTON DIE PRESS COMPANY, LIMITED, *In re.*

JOHNSTONIA ENGRAVING COMPANY, LIMITED, *In re.*

J. P. TRUST, LIMITED *v.* THE ABOVE COMPANIES.

the case of *Crossing* v. *Scudamore* (1) cites and approves of his passage in Hobart." So I think here that, although the machinery was wrong—it was in part beyond the powers of the companies—yet we ought to prevent injustice by holding that the security is good in so far as the moneys of the debenture-holders have come into the coffers of each company for intra vires purposes and have been so employed. And, unless an inquiry is asked for, I think we ought to assume that the moneys have been so employed.

Under these circumstances I think that the appeal ought to be allowed.

ROMER L.J. I have arrived at the same conclusion. With regard to the construction of Clause D in art. 114, it is clear that primâ facie it was intended to confer a power—not to cut down any powers previously conferred on the directors. It is to be observed that before the clause specifies the particular powers, distinguished by letters, it expressly provides that these powers shall be conferred without derogating from the generality of the foregoing powers mentioned in the article. Clause D is not negative in form; it is positive so far as it purports to confer a power. No doubt a negative may arise by implication. But what the implication would be is a question to be determined by a consideration of the wording of the clause and the circumstances of the case. So far I think as an implication is to be drawn from Clause D it ought not to be that, until preference shares are issued, no borrowing powers at all are to be given to the company. In my opinion such a construction would lead to the greatest possible inconvenience and would not be reasonable under the circumstances, and I think it is not justified by the wording of Clause D. I think it really implies a restriction only when preference share capital exists. I think it was not directed to the case of there being no preference share capital at all; and, though this may be a matter of speculation, that the real intent of the clause was to restrict the amount of the borrowing in favour of existing preference shareholders, so that they should not have their security diminished by persons

(1) (1670) 1 Vent. 137, 141.

who had a higher right being placed before them without their consent. At any rate, I cannot come to the conclusion on the construction of Clause D that it is to be inferred that when there is no preference share capital existing there is no power to borrow at all. On the contrary, I think the general power of borrowing exists, and that, as regards this point, the appellants are right.

That brings me to the main point in the case, which I will deal with as shortly as I can. I will assume (but it must not be supposed that I differ from the decision of Byrne J. in this respect) that, so far as these debentures purport in substance to pledge the credit and assets of each company for money not coming to that company alone, but to the other companies also, the debentures were ultra vires. And I think the transaction was at the least irregular, so far as the companies purport to contract jointly, and so far as the moneys raised were carried to a joint account and not paid directly to the several companies rateably. But the transaction was an honest one. There has been no fraud. Money has been honestly advanced, and has come in certain shares into the pockets, if I may use the expression, of each of the three companies. In my opinion, under these circumstances, so far as each company obtained its proportion of the borrowed moneys, the Court ought, in so far as it can legitimately do so, to support the transaction as against each company; and I think that in this case the Court can and ought to uphold the debentures as against each company to the extent to which the money borrowed came into the coffers of the company. There is nothing on the face of the debenture which renders it impossible for us to hold the debenture effectual to the extent which I have mentioned. It is not as if on the face of the debenture merely a joint liability was imposed upon the three companies. Each company undertakes and agrees to pay the whole debt, and each company charges its own assets with the payment of the whole debt. Therefore, so far as the form of the debenture is concerned, although the joint covenant may be treated as bad and indeed as non-existent, yet there is nothing to prevent the

C. A. 1904

JOHNSTON FOREIGN PATENTS COMPANY, LIMITED, *In re.*

JOHNSTON DIE PRESS COMPANY, LIMITED, *In re.*

JOHNSTONIA ENGRAVING COMPANY, LIMITED, *In re.*

J. P. TRUST, LIMITED *v.* THE ABOVE COMPANIES.

Romer L.J.

enforcement of the covenant of each company to pay the debt merely because the amount of it may exceed the amount which actually came to that company. The form seems to make each company liable for the whole debt. It is not impossible, therefore, to say that, even on the face of the debenture, each company may at any rate be liable for so much of the amount covenanted to be paid as came to that company, and, of course, no difficulty arises on the form of the debenture from the fact that a charge is given for the whole debt, for that is clearly a charge for the lesser amount. The transaction was in substance this. Each company wanted money for its own purposes; but they had the same governing body—the same directors. It was thought, erroneously, that they could raise the money wanted for the three companies in a lump sum, and subsequently, after carrying the money to a special account, divide it between the three companies when it had been ascertained exactly how much each company wanted for its particular purposes. So far as each company through the machinery of that joint account got moneys and used them for its own purposes, that company, while purporting to make itself liable for a larger sum, did at any rate borrow the amount which it got, and made itself liable for that amount. I agree that the joint covenant was inoperative, and that the joint account was as a piece of machinery irregular, but still the company did intend to borrow money which was to come to itself. It intended to borrow money part of which should and did come to itself, and I think each company may be said to have borrowed that part, and the borrowing of it was within its powers. To that extent I think there is no objection to holding the transaction valid. On the face of the debentures, having regard to the substance and the way in which the moneys were dealt with, I think the transaction ought to be and can be supported so far as the money raised came to the coffers of the companies respectively.

COZENS-HARDY L.J. I am of the same opinion, and I have not much to add; indeed, I do not propose to add a word as to the construction of art. 114. But as regards the main point

of law which has been argued, speaking for myself, I entirely agree with what Byrne J. said in his judgment, that a general power to borrow given to a company and exercisable by the company in the terms which are to be found in the present case does not authorize a joint borrowing with other companies of money which is to be charged upon the whole undertakings of all the companies. Upon that assumption I approach the consideration of this debenture. I cannot shut my eyes to this—that the real intention and object was that each of the three companies should have a portion, thereafter to be ascertained, of the 25,000*l.* which was to be advanced by the debenture-holders. In that there was no illegality. Suppose there had been three separate debentures each for 25,000*l.*, one given by each of the companies. In that case it would have been plain that each debenture would be good, not for the whole 25,000*l.*, but only for the amount which was actually received by the company and found its way into its coffers. Is there any difficulty in our giving the like effect to this debenture? I agree it is muddled in form, but it contains a separate covenant by each company and a separate charge upon the assets of each company. It seems to me that, having regard to the honesty of the whole transaction, we ought not to deprive these debenture-holders of their security, but ought to say that the debentures are a valid security created by each company upon its own assets to the extent to which that company has received any part of the 25,000*l.*

Minutes of order of Court of Appeal as indorsed on counsel's brief:—

Declare that the debentures in so far as they purport to effect a joint borrowing by the three companies are ultra vires and void, but that the respective debenture-holders are entitled to hold the debentures as a good security against each company to the extent to which the proceeds of the issue reached each company. The taxed costs of all parties in both Courts to be paid out of the assets of the three companies in priority to the debentures.

Solicitors: *Pakeman & Read; Blundell, Gordon & Co.*

W. L. C.

KEKEWICH J. 1904 June 20, 27.

ATTORNEY-GENERAL *v.* NATIONAL HOSPITAL FOR THE RELIEF AND CURE OF THE PARALYSED AND EPILEPTIC.

[Land Registry Titles 84,920, 84,921.]

Charity—Land Transfer—Consent of Charity Commissioners to Sale of Charity Lands—Entry on Register with Restriction—Royal Charter—Charitable Trusts Amendment Act, 1855 (18 & 19 *Vict.* c. 124), *s.* 29—*Land Transfer Rules*, 1903, *rr.* 29, 83, *Sched. I., Form* 13.

A Royal Charter incorporating a charity (though containing provisions for the management of the charity and a power to the charity to sell lands) is not a "scheme legally established" within s. 29 of the Charitable Trusts Amendment Act, 1855, so as to exempt the charity from the necessity of obtaining the consent of the Charity Commissioners to a sale of its lands.

In re Mason's Orphanage and London and North Western Ry. Co., [1896] 1 Ch. 596, applied.

THIS was an appeal by the Attorney-General from a decision of the registrar in the Land Registry on an application by the National Hospital for the Relief and Cure of the Paralysed and Epileptic for entry on the register as proprietors of certain buildings and lands without any restriction on their power to dispose of the property under s. 29 of the Charitable Trusts Amendment Act, 1855 (18 & 19 Vict. c. 124).

The hospital existed as a voluntary association or society for many years prior to July 29, 1903, when it was incorporated by a Royal Charter, which contained similar provisions to those usually contained in schemes established by the Court, including the following powers for the acquisition and disposition of property:—

"We do also hereby for ourself, our heirs and successors, license, authorize, and for ever hereafter enable the society hereby incorporated, or any person on its behalf, to acquire any lands, tenements, or hereditaments whatsoever within our United Kingdom of Great Britain and Ireland, or interests therein, now held by or belonging to the said voluntary association, or by or to any person or persons on its behalf, and also

to acquire any additional lands, tenements, and hereditaments whatsoever within our United Kingdom (such additional lands, tenements, and hereditaments, not exceeding at any one time the annual value of 5000*l.*), and to hold all or any lands which the society is hereby authorized to acquire in perpetuity or on lease or otherwise, and from time to time to grant, demise, alienate, or otherwise dispose of the same or any part thereof."

The charter then proceeded to state "the objects" of the society, including the taking over of the hospital in Queen Square, Bloomsbury, a convalescent home at East Finchley, and all lands, securities, moneys, and properties of every description real or personal. Subsequent clauses dealt with "Membership" and "The Powers of the Board of Management," which latter included the following express powers vested in the board of management:—

"(*g*) Power to deal with the moneys and funds of the society, and invest the same in any of the securities for the time being authorized by the society's by-laws, and from time to time to vary and realize such investments. Provided that such realizations except for the purpose of reinvestment shall not without the consent of a general meeting of the society exceed the sum of 5000*l.* in any one year.

"(*h*) Power to borrow money for the purposes of the society provided that the amount owing at any one time shall not without the sanction of a general meeting of the society exceed 10,000*l.*, and to mortgage and hypothecate the property of the society or any part thereof to secure the repayment thereof or for the purpose of indemnifying any person or persons whilst members of the board, or otherwise, against any liability assumed by him or them on behalf of the society."

On March 29, 1904, the hospital applied to be registered with possessory title in respect of their estate in Titles 84,920 and 84,921, without any restriction as to the powers of the board of management to dispose of the property under s. 29 of the Charitable Trusts Amendment Act, 1855 (18 & 19 Vict. c. 124). (1)

(1) Sect. 29 of 18 & 19 Vict. c. 124 provides as follows: "It shall not be lawful for the trustees or persons acting in the administration of any

KEKEWICH J.
1904
ATTORNEY-GENERAL v. NATIONAL HOSPITAL FOR THE RELIEF AND CURE OF THE PARALYSED AND EPILEPTIC.

The Charity Commissioners objected, and the registrar gave them an opportunity of attending the hearing of the hospital's application, but they did not do so. The registrar on June 1, 1904, gave his decision in favour of the hospital, relying on certain observations of Kay L.J. in *In re Mason's Orphanage and London and North Western Ry. Co.* (1) as tending strongly in favour of the view that the words "scheme legally established" might include regulations (adequate for the purpose) contained in a Royal Charter, the authority of which, derived directly from the Crown, would appear to be of the same character as that of the Court.

From this decision the Attorney-General appealed, and by his summons asked that "so far as necessary the land register may be rectified by an entry that the estate of the respondents under the titles above mentioned is or may be subject to a restraint on alienation without the consent of the Charity Commissioners for England and Wales under s. 29 of the Charitable Trusts Act, 1855."

By direction of the registrar, the summons was heard by the judge in person.

Sir R. B. Finlay, A.-G., and *E. Beaumont*, for the summons. The registrar was wrong in deciding that the charter establishing this institution is a scheme legally established within s. 29 of the Charitable Trusts Amendment Act, 1855 (18 & 19 Vict. c. 124), and in making an unqualified entry on the register under rule 29 of the Land Transfer Rules, 1903, in respect of the titles here in question. This is a charity requiring the sanction of the Charity Commissioners for a sale of its lands, for a scheme in connection with a charity has a perfectly well-established meaning, namely, either a scheme sanctioned by the Chancery

---

charity to make or grant, otherwise than with the express authority of Parliament, under any Act already passed or which may hereafter be passed, or of a Court or judge of competent jurisdiction, or according to a scheme legally established, or with the approval of the board, any sale, mortgage, or charge of the charity estate, or any lease thereof in reversion after more than three years of any existing term, or for any term of life, or in consideration wholly or in part of any fine, or for any term of years exceeding twenty-one years."

(1) [1896] 1 Ch. 596.

Division of the High Court, or a scheme prepared under statutory powers. The provisions in the charter as to the acquisition and disposition of lands cannot suffice without a compliance with the Act. The registrar's interpretation of what was said by Kay L.J. in *In re Mason's Orphanage and London and North Western Ry. Co.* (1) is inaccurate, for the judgment of Lindley L.J. contains a clear approval of that of Stirling J. in the Court below to the effect that a deed of declaration of trusts of a charity is not a "scheme legally established." The principle of that decision is applicable to this case, although the Court was there considering the trusts of an ordinary deed of foundation and not a Royal Charter.

H. Knox, for the hospital. This charter covers the ground usually contained in the forms of schemes for the administration and management of charities, and is what constitutes the charity, whatever may have gone before. In *In re Mason's Orphanage and London and North Western Ry. Co.* (1) all the learned judges, and especially Kay L.J., use general expressions pointing to some duly constituted outside authority, although they also refer to schemes sanctioned by the Court.

[Reference was also made to *Attorney-General* v. *Smart* (2) and *Attorney-General* v. *Middleton*. (3)]

KEKEWICH J. But that the learned registrar has arrived at a conclusion different from my own, I should have thought that the question submitted by the summons was not one of much difficulty, or open to reasonable doubt. It is only fair to the registrar to say that he has not had the invaluable assistance which I have had of arguments on behalf of the Charity Commissioners, and I think he was misled by expressions in some of the judgments of the Court of Appeal, notably in that of Kay L.J., the strict construction of which taken alone would easily have been shewn to be not consistent with the view of the Court and with the construction of the Act of Parliament adopted by them.

Treating this case for a moment as independent of decision,

(1) [1896] 1 Ch. 54, 596, 603. (2) (1747) 1 Ves. Sen. 72.
(3) (1751) 2 Ves. Sen. 327.

KEKEWICH J.
1904
ATTORNEY-GENERAL v. NATIONAL HOSPITAL FOR THE RELIEF AND CURE OF THE PARALYSED AND EPILEPTIC.

the Act says that there shall be no sale made except with the sanction of the Commissioners unless it is made "with the express authority of Parliament, under any Act already passed or which may hereafter be passed, or of a Court or judge of competent jurisdiction or according to a scheme legally established." I need not go further, but it is important to go so far in order to read the context, and to shew what was in the mind of the Legislature in using the words "a scheme legally established." It is put there in contrast with an Act of Parliament, which, of course, would override this Act of 1855 with which we are dealing, and in contrast also with the decision of a Court or judge of competent jurisdiction. Where the jurisdiction is competent, that jurisdiction was intended to be preserved. What, then, is the meaning of a scheme legally established? It seems to me that that must mean a scheme emanating from some Court or duly constituted authority which has power to make a scheme, meaning a scheme for the administration and management of the charity—not the instrument founding the charity or establishing the charity. Is this charter a scheme in that sense? It is true that the charter has been carefully framed so as to give the charity a power of sale. This point may or may not have escaped notice, but there can be no doubt that the words are express, and that the framers of this charity must be taken to have contemplated and intended that there should be an express power of sale, and without the consent of the Charity Commissioners. But that cannot override the Act of Parliament, unless the charter comes within the words "a scheme legally established." The question again is, is this a scheme? It is perfectly competent for the Crown to establish or found any corporation mero motu without any application to it, without any prior existence inchoate, or, if I may be allowed to use such an expression, embryonic. But as a matter of fact of course—as a matter of history and as a matter of practice—that never occurs. Whether it is a charity or whether it is a business corporation, there is always a prior existence; there is always some body of persons existing who can petition for the charter and submit the charter to the Crown. It has so happened in the course of my experience at the Bar and on

the Bench that I have come across several of the chartered banks, and become acquainted with their history. They are banks which can hardly be said to have had existence until the charter was granted, but yet were formed in order that there might be a body of persons who might present a petition to the Crown and obtain the charter. Here it seems that there was existing a society called by the same name who presented the petition, and, as in the case of the chartered banks, in that sense there was a prior existence. But that is only, after all, a matter of words. The existence of this body dates from and originates in and is founded on the charter itself. It existed unincorporated before, but now exists in an entirely different form—a separate entity in the shape of a corporate body constituted by charter, and this is really the foundation deed, or, if exception be taken to the word "deed," at any rate the foundation instrument, and it is not a scheme for the regulation or for the administration or for the management of the charity. If the objection be taken that the charter does itself contain all the necessary rules for administration and management, the answer is that they are incident no doubt to the foundation; but they are incident to it, and not really the essential part of it. The essential part of it—the real essence of this charter—is the incorporation of the charity—the foundation of it in its corporate character. That seems to me to shew conclusively that it is not a scheme within the meaning of the Act of Parliament; it is not "a scheme legally established," repeating the words, by a duly constituted authority.

But really I have only put into my own language what seems to me to have been plainly decided by the Court in the case of *In re Mason's Orphanage and London and North Western Ry. Co.* (1) It came first before Stirling J., a judge of exceptionally large experience as an adviser of the Crown, which gives him particularly great authority on such a point as this. I will quote one or two passages from his judgment. He says (2): "Usually, when a scheme is spoken of in connection with a charity, what is meant is, not the instrument of

(1) [1896] 1 Ch. 54, 596. (2) [1896] 1 Ch. 57.

KEKEWICH J.
1904
ATTORNEY-GENERAL v. NATIONAL HOSPITAL FOR THE RELIEF AND CURE OF THE PARALYSED AND EPILEPTIC.

foundation, but a document sanctioned by some properly constituted authority containing directions for the administration of the charity." It seems to me a fallacy to say that you may have a document sanctioned by some properly constituted authority which is also the instrument of foundation, and that Stirling J. did not intend to contrast the instrument of foundation with the document sanctioned by some properly constituted body. He repeats shortly the same thing later (1), where he says: "As a mere matter of verbal construction, therefore, I should come to the conclusion that the words 'scheme legally established' did not include the instrument by which the charity was founded." I have given in my own language reasons for concluding that this is really the instrument of foundation, the instrument by which the charity is founded, and is not a scheme. In the Court of Appeal Lindley L.J. said (2): "What is the real meaning of those words? I do not think that any lawyer who knows anything at all about charities, and who has been accustomed to the language which is applied to charities, would hesitate for a moment in saying that 'a scheme legally established' is a technical expression, and has a definite meaning as applied to charities." Then he goes on to explain what he means, and he adds: "I cannot read the language 'according to a scheme legally established' as equivalent to 'according to trusts duly declared.'" Here we have trusts duly declared by a Royal Charter, which is something different from a scheme legally established.

I do not propose to go through the judgments of the other Lords Justices, but the learned registrar has pointed out that Kay L.J. supported his view, and has quoted one sentence which he unhappily dissociated from the rest of the judgment as his authority for holding as he did hold. There is a little confusion, if I may venture to say so, in the language of the Lord Justice, and it crops up in the very passage which is quoted by the learned registrar, where he speaks of a charity established by a scheme. He was considering, and I am considering, "a scheme legally established," and he did not allow himself to lose sight of that; but he unfortunately, I venture to

(1) [1896] 1 Ch. 59. (2) [1896] 1 Ch. 601.

say, speaks there of a charity established by a scheme which was not what he had under consideration, and no doubt he uses in that connection words which might very well point to the conclusion at which the learned registrar arrived. Again, at the conclusion of his judgment he unfortunately, if I may again presume to say so, slips in the words " or by a grant from the Crown " in a connection in which they were not wanted, and were, as I humbly venture to think, out of place. But the Lord Justice was agreeing with Stirling J., and he agrees also with Lindley L.J., in saying (1) : " The word ' scheme ' has a meaning with reference to charities which was completely settled and thoroughly well known long before this Act was passed, and, therefore, where the word ' scheme ' is used instead of ' trust ' or any ordinary word which would describe a trust, primâ facie ' scheme ' must mean that which the Courts have always understood by that word in relation to a charity, unless there is something in the context which contradicts that meaning." Taking that, and taking his general approval of Stirling J.'s judgment, together with his entire concurrence with the other members of the Court, I think it would be wrong to infer from the use of particular expressions in his judgment that he thought that the grant from the Crown of a Royal Charter could be read as " a scheme legally established " within the meaning of the Act of Parliament. I certainly read the judgment in the Court of first instance and the judgments in the Court of Appeal, as conclusively deciding beyond all doubt, even if I entertained any, which I do not, that a " scheme legally established " cannot be found in the instrument of foundation notwithstanding that the instrument of foundation is a Royal Charter. Therefore I must make the order asked for by the summons.

H. Knox, for the hospital. The order should say that the restriction should be entered in the register so as to shew that " no disposition is to be registered without the consent of the Charity Commissioners or an order of the registrar," as prescribed by rule 83 of the Land Transfer Rules, 1903, and form 13 in the 1st schedule thereto.

(1) [1896] 1 Ch. 602.

KEKEWICH J.
1904
ATTORNEY-GENERAL v. NATIONAL HOSPITAL FOR THE RELIEF AND CURE OF THE PARALYSED AND EPILEPTIC.

KEKEWICH J. I must take care not to attempt to do what the framers of the charter attempted to do, that is, override the Act of Parliament; but I have reason to know that these rules were framed as they are with the express consent of the Charity Commissioners. This question must be adjourned for a week for the Attorney-General and the Charity Commissioners to consider the point.

June 27. *E. Beaumont*, for the Attorney-General. We are quite content to let the order run in accordance with form 13 as proposed, if it is understood to mean, not that the registrar has absolute power to say when a sale or disposition may be made, but that he has a discretion to make the order when he is satisfied that the scheme of a charity contains the power within the meaning of s. 29 of the Charitable Trusts Amendment Act, 1855.

KEKEWICH J. Then the order will, in accordance with form 13, include the words "without the consent of the Charity Commissioners or an order of the registrar."

Solicitors: *The Treasury Solicitor; Paines, Blyth & Huxtable.*

H. B. H.

ROBINS *v.* GODDARD.

FARWELL J.

1904

June 9.

[1903 R. 822.]
[1903 R. 1004.]
[1903 R. 1881.]

Building Contract—Construction—Architect—Certificate not to be conclusive of Sufficiency of Work or Materials—Defective Work and Materials—Claim for Damages.

In a contract for the execution of specified works A. was nominated the architect for the purposes of the contract. Clause 16 of the contract empowered the architect to order in writing from time to time the removal of improper materials, the substitution of proper materials, and the removal and proper re-execution of any work not in accordance with the drawings and specification. Clause 17 provided that any defects which might appear within twelve months from the completion of the works, arising, in the opinion of the architect, from materials or workmanship not in accordance with the drawings and specification, should upon the written direction of the architect be made good by the contractor at his own cost, unless the architect should decide that he ought to be paid for the same. Clause 30, after providing for the payment of the contractor under certificates to be issued from time to time by the architect, contained this proviso: "No certificate shall be considered conclusive evidence as to the sufficiency of any work or materials to which it relates, nor shall it relieve the contractor from his liability to make good all defects as provided by this contract." In an action by the contractor against his employer for the amounts due on the certificates which A. had issued under the contract, the employer contended that the proviso in clause 30 entitled him, notwithstanding the certificates, to set off the damages he had sustained by reason of defective work done and materials employed by the contractor in carrying out the contract:—

Held, that clause 30 must be read with clauses 16 and 17, and that, in the absence of fraud or collusion on the part of A., the certificates were conclusive, A. not having made any order under those clauses for defective work to be made good, nor given any direction that the contractor was not to be paid for the same.

THESE were three actions between the same parties which had been consolidated by an order of the Court. The plaintiff's claim in each action was for the sums of money due to him from the defendant on the certificates issued to him by the architect under the following contract.

By a written contract dated October 15, 1902, and made

FARWELL J. 1904 ROBINS v. GODDARD.

between the defendant (thereinafter called "the employer") of the one part, and the plaintiff (thereinafter called "the contractor") of the other part, the plaintiff agreed to execute upon and subject to the conditions set forth in the schedule thereto the works shewn upon the drawings and described in the specification prepared by Mr. Ferguson, an architect, for the sum of 1000*l.*; and by clause 3 of the contract Mr. Ferguson was nominated "the architect" for the purposes of the contract. The material conditions in the schedule were the following:—

"1. The works shall be carried out in accordance with the directions and to the reasonable satisfaction of the architect, in accordance with the signed drawings and specification, and in accordance with such further drawings, details, instructions, directions, and explanations as may from time to time be given by the architect. . . .

"16. The architect shall, during the progress of the works, have power to order in writing from time to time the removal from the works, within such reasonable time or times as may be specified in the order, of any materials which in the opinion of the architect are not in accordance with the specification or the instructions of the architect, the substitution of proper materials, and the removal and proper re-execution of any work executed with materials or workmanship not in accordance with the drawings and specification or instructions; and the contractor shall forthwith carry out such order at his own cost. In case of default on the part of the contractor to carry out such order, the employer shall have power to employ and pay other persons to carry out the same; and all expenses consequent thereon or incidental thereto shall be borne by the contractor, and shall be recoverable from him by the employer, or may be deducted by the employer from any moneys due or that may become due to the contractor."

"17. Any defects, shrinkage, or other faults which may appear within twelve months from the completion of the works, arising in the opinion of the architect from materials or workmanship not in accordance with the drawings and specification or the instructions of the architect, or any damage to pointing

by frost appearing within the like period, shall upon the directions in writing of the architect, and within such reasonable time as shall be specified therein, be amended and made good by the contractor at his own cost, unless the architect shall decide that he ought to be paid for the same; and in case of default the employer may employ and pay other persons to amend and make good such defects, shrinkage, or other faults or damage, and all expenses consequent thereon or incidental thereto shall be borne by the contractor and shall be recoverable from him by the employer, or may be deducted by the employer from any moneys due or that may become due to the contractor . . . .

"30. The contractor shall be entitled under the certificates to be issued by the architect to the contractor, and within fourteen days of the date of each certificate, to payment by the employer from time to time by instalments, when in the opinion of the architect work to the value of 100*l.* (or less at the reasonable discretion of the architect) has been executed in accordance with the contract, at the rate of 80 per cent. of the value of the work so executed in the building, until the balance retained in hand amounts to the sum of 200*l.*, after which time the instalments shall be up to the full value of the work subsequently executed. The contractor shall be entitled, under the certificate to be issued by the architect, to receive payment of 100*l.*, being part of the said sum of 200*l.*, when the works are practically completed, and in like manner to payment of the balance within a further period of two months, or as soon after the expiration of such period of two months as the works shall have been finally completed, and all defects made good according to the true intent and meaning hereof, whichever shall last happen. The architect shall issue his certificates in accordance with this clause. No certificate of the architect shall be considered conclusive evidence as to the sufficiency of any work or materials to which it relates, nor shall it relieve the contractor from his liability to make good all defects as provided by this contract . . . ."

32 was the usual arbitration clause.

The contract and conditions were the usual printed common

FARWELL J. 1904 ROBINS v. GODDARD.

form issued under the sanction of the Royal Institute of British Architects, and were in general use in the building trade.

The plaintiff proceeded to do the work under the contract. Frequent disputes arose between the defendant and the plaintiff as to the material used, and also as to the manner in which the work and considerable extras ordered by the defendant were carried out. The architect gave his first certificate on February 23, 1903, his second certificate on March 27, 1903, and his third certificate on April 9, 1903. Each of these certificates was for 250*l.*, and the plaintiff's first action was for the amount due on these three certificates, less 175*l.* paid on account by the defendant. The second action was for the amount due on the fourth certificate of the architect; and the third action was for the amount due on the final certificate of the architect, which was for the balance of the work done including extras, and was issued on June 24, 1903. The three actions were consolidated as above stated.

The defendant by his defence did not admit his liability for the amount due on the certificates; and by his counter-claim he alleged that a great deal of the work was defective and executed with improper materials, that the certificates were not conclusive, and he claimed to set off such sums as might be found due to him in respect of (*a*) defective work and materials, and (*b*) the estimated cost of work which he would be compelled to re-execute; and he also claimed damages in respect of the matters aforesaid.

Duke, *K.C.*, and *Beddall*, for the plaintiff. The architect's certificates are conclusive and binding on the defendant. There is really no defence to the plaintiff's claim, for no fraud or collusion is alleged against the architect. The onus is on the defendant to make out his counter-claim.

C. B. Marriott, for the defendant. Under the 30th condition of the contract the certificates are not conclusive. I rely on the words "No certificate of the architect shall be considered conclusive evidence as to the sufficiency of any work or materials to which it relates, nor shall it relieve the contractor from his liability to make good all defects as provided by this con-

tract." That clause entitles the plaintiff to open up the certificates and to give evidence of all the defective work and materials in respect of which he is entitled to a set-off. The disputed items are very numerous, and ought to be referred for determination either under the arbitration clause or to an official referee of the Court.

Beddall. The 30th condition must be read with the rest of the contract, and in particular with the 16th and 17th conditions. The certificates are conclusive as to the work done and the amount due except in respect of defects which under the 16th and 17th conditions the architect shall order to be made good. There is no direct authority on the point. The nearest case to the present is *Lord Bateman* v. *Thompson*, which is only reported in Hudson on Building Contracts, 2nd ed. vol. ii. p. 166. Here no defects have occurred in the opinion of the architect. The defendant, therefore, cannot maintain his counter-claim.

C. B. Marriott, in reply.

FARWELL J. So far as this action is concerned, it is a claim upon certificates given by the architect under a contract, and it is really undefended. But there is a counter-claim which gives rise to the arguments that I have heard. The counter-claim depends upon the construction of the contract, and, inasmuch as the contract is issued under the sanction of the Royal Institute of British Architects and is a printed form in common use, its true construction has some little importance apart from the interests of the parties to this litigation. Now one approaches contracts of this nature with the knowledge that an employer who desires to employ a builder generally retains for his own protection an expert, an architect, whom he appoints and who is by the terms of the contract imposed on the builder as the referee or judge in relation to any matters which may arise in the course of the construction of the building. Under the contract in this case the builder can recover nothing except under the certificates given him by the architect under the 30th condition of the contract. Now that condition is qualified by a proviso at the end of it, which in

FARWELL J. 1904 ROBINS v. GODDARD.

my view is to be read with and is explicable by the former conditions in the contract, and is not, as Mr. Marriott argued, to be extracted and treated as a separate sentence and read as something apart and by itself. The 16th condition provides that "the architect shall, during the progress of the works, have power to order in writing from time to time the removal from the works, within such reasonable time or times as may be specified in the order, of any materials which in the opinion of the architect are not in accordance with the specification or the instructions of the architect, the substitution of proper materials, and the removal and proper re-execution of any work executed with materials or workmanship not in accordance with the drawings and specification or instructions, and the contractor shall forthwith carry out such order at his own cost"; and power is given to the employer to employ somebody else, if the contractor does not do it. Then the 17th condition is this: "Any defects, shrinkage, or other faults, which may appear within twelve months from the completion of the works, arising in the opinion of the architect from materials or workmanship not in accordance with the drawings and specifications or the instructions of the architect, or any damage to pointing by frost appearing within the like period, shall upon the directions in writing of the architect, and within such reasonable time as shall be specified therein, be amended and made good by the contractor at his own cost, unless the architect shall decide that he ought to be paid for the same." Reading these provisions with the proviso in the 30th condition, that "No certificate of the architect shall be considered conclusive evidence as to the sufficiency of any work or materials to which it relates, nor shall it relieve the contractor from his liability to make good all defects as provided by the said contract," it makes the contract to my mind perfectly reasonable and plain. I should prefer, instead of the word "nor" coupling the two sentences in the proviso, to read it, "No certificate of the architect shall be considered conclusive evidence as to the sufficiency of any work or materials to which it relates *so as to* relieve the contractor from his liability under this contract," which in my

view is really the true effect of it. If it were not so, it would be open to the contractor to contend—"The 16th condition says the architect may give these directions as to improper materials, and so on, during the course of the work. He has given his certificate, and so far as materials or defects are concerned he must be deemed to have dealt with them by that certificate, which is final and no longer open to question." To prevent that contention, this proviso is inserted in the 30th condition; but it is only for the purpose of letting in the 17th condition. That this is so appears to my mind conclusively shewn by the words, "Unless the architect shall decide he ought to be paid for the same." That obviously makes the architect, who by clause 3 of the contract is the nominee of the employer, and is employed by him for his own protection, the referee as between the two parties. This is not one of the matters which is referred to arbitration; or, if it be, it is not a matter which is before me at present. The point before me is this, that the counter-claim asks me to decide, either by myself or by the official referee, questions as to deficient workmanship and materials which are said to be not in accordance with the drawings and specification. Now that is a matter which is provided for by this particular 17th condition, and unless the architect has not only expressed his opinion that they are not in accordance with the drawings and specification, but has also directed that the builder ought not to be paid for them, I do not see how there is anything before me on which I can possibly adjudicate in any way; I have in fact no jurisdiction. The result is that in my opinion there is no case on the counter-claim. It is merely an undefended action on the certificates, and judgment must go for the plaintiff for the amount claimed, with costs.

Solicitors: *Booth & Smee; Goddard, Stanton & Hudson.*

H. L. F.

BUCKLEY J.
1904
April 20.

In re SOUTH AFRICAN SUPPLY AND COLD STORAGE COMPANY. WILD *v.* SAME COMPANY.

[1903 S. 4368.]

Company — "Reconstruction" — "Amalgamation" — "Winding-up for the Purpose of Reconstruction or Amalgamation."

Neither "reconstruction" nor "amalgamation" has any definite legal meaning. Each word is a commercial and not a legal term, and even as a commercial term has no exact definite meaning.

Where an undertaking is being carried on by a company, and is in substance preserved and transferred, not to an outsider, but to another company, consisting substantially of the same shareholders, with a view to its being continued by the transferee company, that is a reconstruction; and it is none the less a reconstruction because all the assets do not pass to the new or resuscitated company, and all the shareholders of the transferor company are not shareholders in the transferee company, and the liabilities of the transferor company are not taken over by the transferee company.

To constitute "amalgamation" there must be a blending of substantially two or more existing undertakings into one undertaking, the shareholders of each blending company becoming substantially the shareholders in the company which holds the blended undertakings; and there may be amalgamation either by the transfer of two or more undertakings to a new company, or by the transfer of one or more undertakings to an existing company.

It is not necessary that a resolution for winding-up should refer to "reconstruction" or "amalgamation" in order to constitute a "winding-up for the purpose of reconstruction or amalgamation," but the purpose of the winding-up may be gathered from the whole of the circumstances which result in reconstruction or amalgamation.

The S. Company had powers under its memorandum of association to amalgamate with any other company, and to sell its undertaking, or any part thereof, for shares or debenture stock of any other company, and under its articles of association the liquidator, in the case of winding-up, had power to divide amongst the contributories in specie any part of its assets. Its memorandum of association also gave to its preference shareholders the right in the event of "a winding-up for the purpose of reconstruction or amalgamation" to a bonus by way of percentage on the par value of the preference shares.

The S. Company issued debenture stock, constituted and secured by a trust deed under which the stock was redeemable only at a premium in the event of the security becoming enforceable by reason of "a

voluntary winding-up of the company for the purpose of reconstruction or amalgamation."

After the S. Company had carried on business for a short time, a rival company, the I. Company, was formed; and accordingly in February, 1902, the A. Company was incorporated to take over the business and certain of the assets of the S. Company. The memorandum of association and debenture stock deed of the A. Company gave to its preference shareholders and debenture stock holders respectively rights to a bonus and premium in the case of a winding-up of that company "for the purpose of reconstruction or amalgamation."

In the same month the A. Company agreed with the S. Company to purchase the business and some of the assets of the latter for 1,000,000*l.*, to be satisfied in cash and in fully paid preference and ordinary shares and debenture stock of the A. Company. The remaining (unsold assets) of the S. Company consisted of cash, investments, and other things of the value of over 1,500,000*l.*

In May, 1902, the C. Company was incorporated with (after an increase of capital) an ordinary capital twice the amount of the ordinary capital of the S. Company, and a preference capital equal to the preference capital of the S. Company.

In August, 1902, "heads of agreement" (formally entered into by an agreement of May, 1903) were entered into under which the A. Company was to sell to the I. Company the business and assets purchased by the former from the S. Company, and the stock-in-trade and working capital of the A. Company. The purchase consideration was to be 1,650,000*l.*, to be satisfied as follows: 1,000,000*l.* in fully paid shares of the I. Company, representing the 1,000,000*l.* ordinary share capital of the A. Company; 500,000*l.* in debentures of the I. Company, to replace the preference share capital and debenture stock of the A. Company; and 150,000*l.* payable to certain firms interested in the I. Company. There was no provision that the A. Company should wind itself up, but 500*l.* was to be retained out of its assets for liquidation expenses. At a meeting of the A. Company held in September, 1902, a distribution on the lines above indicated was mentioned in speeches by the chairman of the company and others.

In view of an agreement of February, 1903 (referred to below), a meeting of the S. Company was held at which the chairman and others referred to an intended winding-up of the company, and to the manner in which the shares of the C. Company were to replace the shares in the S. Company.

By an agreement of February, 1903, the S. Company agreed to sell to the C. Company all its remaining assets (including the shares in the A. Company, to which it was entitled as the consideration for the previous sale to that company), excepting assets of the value of 295,000*l.* retained to pay the debts of the S. Company. The consideration for this sale was to be the whole of the 618,000 ordinary shares, and 150,000 preference shares of the C. Company, to be allotted as fully paid up.

Subsequently both the A. Company and the S. Company passed special

BUCKLEY J.

1904

SOUTH AFRICAN SUPPLY AND COLD STORAGE COMPANY, *In re.*

WILD *v.* SAME COMPANY.

resolutions simply for voluntary winding-up, without referring to any amalgamation or reconstruction, or consideration or distribution of shares. At one of the meetings of the S. Company for passing the resolution of that company, reference was made by the chairman to the proposed distribution of the C. Company's shares. Afterwards the S. Company passed an extraordinary resolution authorizing its liquidators to distribute in specie amongst its contributories in the proportion of two shares for every ordinary share in the S. Company the 618,000 ordinary shares in the C. Company which formed part of the consideration referred to in the agreement of February, 1903:—

Held, that there was a "reconstruction" of the S. Company, and that its winding-up was "for the purpose of reconstruction":

Held, also, there was an "amalgamation" of the A. Company with the I. Company, and that the winding-up of the A. Company was "for the purpose of amalgamation."

THE South African Supply and Cold Storage Company, Limited (below called "the Supply Company") was incorporated in 1899.

Its objects, as specified in clause 3 of its memorandum of association, were, inter alia—(1.) to acquire a certain business and certain assets and liabilities in connection therewith; (2.) to carry on in South Africa or elsewhere the business of dealers in and importers of meat, live and dead stock, cattle and sheep, purveyors of and dealers in food supplies, ice manufacturers, cold storage providers, &c.; (14.) "to amalgamate with any other company having objects altogether or in part similar to those of this company"; (17.) "to sell the undertaking of the company, or any part thereof, for such consideration as the company may think fit, and in particular for shares or debentures, debenture stock, or other securities of any other company, having objects altogether or in part similar to those of this company"; (18.) to promote other companies; (22.) to borrow money and secure repayment by issuing debenture stock, &c.

Clause 5 of the memorandum of association was as follows: "The capital of the company is 450,000*l.*, divided into 150,000 cumulative preference shares of 1*l.* each, and 300,000 ordinary shares of 1*l.* each. The said preference shares shall confer on the holders thereof the right to a fixed cumulative preferential dividend at the rate of 7 per cent. per annum on the capital

for the time being paid up thereon respectively, and the right in the event of a winding-up *for the purpose of reconstruction or amalgamation* to a bonus of 15 per cent. on their par value, and such preference shares shall have priority as to dividend, and also as to return of capital and the said bonus, over all other shares for the time being of the company, but shall not confer any further right to participate in profits or surplus assets. The rights hereby attached to the said preference shares may be modified in accordance with clause 52 of the accompanying articles of association, but not otherwise."

The ordinary share capital was afterwards increased to 309,000*l.*

Clause 52 of the articles of association provided for a modification in certain events of the rights of different classes of shareholders, and clause 159 was as follows: "If the company shall be wound up (whether voluntarily or otherwise) the liquidators may, with the sanction of an extraordinary resolution, divide among the contributories in specie any part of the assets of the company, and may, with the like sanction, vest any part of the assets of the company in trustees upon such trusts for the benefit of the contributories as the liquidators, with the like sanction, shall think fit, and if thought fit such division may be made otherwise than in accordance with the legal rights of the members of the company (except when defined by the memorandum of association), and in particular any class may be given preferential or special rights or may be excluded altogether or in part; but in case any division otherwise than in accordance with such legal rights shall be determined on, any contributory who would be prejudiced thereby shall have a right of dissent and ancillary rights as if such determination were a special resolution passed pursuant to s. 161 of the Companies Act, 1862."

By a trust deed (constituting debenture stock to the amount of 1,000,000*l.*) dated July 14, 1899, and made between the Supply Company of the one part, and the Ocean Accident and Guarantee Corporation, Limited, thereinafter called "the present trustees" and below called "the Ocean Company," of the other part, the Supply Company charged certain of its

BUCKLEY J.
1904
SOUTH AFRICAN SUPPLY AND COLD STORAGE COMPANY, *In re.*
WILD *v.* SAME COMPANY.

property to the Ocean Company as trustees for the stockholders. Clause 10 of the deed provided that the security should become enforceable in certain events, one of which was, "If an order shall be made or an effective resolution shall be passed for the winding-up of the company." Condition 1 of the 1st schedule to the deed was as follows: "At any time after the 1st day of January, 1909, the company may give to the stockholders not less than six calendar months' notice of its intention to redeem the stock or some specified amount thereof at the rate of 107*l.* 10*s.* for every 100*l.* of the stock, and at the expiration of the notice the stock or (subject as hereinafter provided) the said specified amount thereof will be redeemed accordingly. Any of the stock not previously redeemed will be redeemed when and so soon as the security hereby constituted becomes enforceable, that is to say, at the rate of 107*l.* 10*s.* for every 100*l.* of the stock in the event of the said security becoming enforceable by reason of a voluntary winding-up of the company for the purpose of reconstruction or amalgamation; but otherwise at the rate of 100*l.* for every 100*l.* of the stock, and as and when any stock ought to be redeemed in accordance with these presents the company will, subject to these conditions, pay to the several holders of the stock the redemption moneys therefor calculated at the rates respectively or one of the rates aforesaid as hereinbefore provided."

There was subsequently a supplementary trust deed dated April 10, 1902, but its provisions did not affect the condition above set out.

After the Supply Company had carried on business for some years, a rival company, the Imperial Cold Storage and Supply Company, Limited (below called "the Imperial Company"), was incorporated on February 19, 1902, with a capital of 650,000*l.* in ordinary shares, and there was a prospect of competition between the two companies.

In that state of things the South African and Australasian Supply and Cold Storage Company, Limited (below called "the Australasian Company"), was incorporated on February 25, 1902, with a capital of 1,150,000*l.*, divided into 150,000 cumula-

tive preference shares of 1*l.* each, and 1,000,000 ordinary shares of 1*l.*, and having as one of its objects "to take over and carry on as a going concern the business now carried on .... by the South African Supply and Cold Storage Company, Limited, together with the goodwill thereof and certain of the assets held by that company in connection therewith." Other objects were "to amalgamate with any other company having objects altogether or in part similar to those of this company," and to sell the undertaking or any part thereof for a consideration including shares and debentures or debenture stock.

Clause 5 of this company's memorandum of association provided as follows: "The said preference shares shall confer on the holders thereof the right to have the profits of the company applied in payment of a fixed cumulative preferential dividend at the rate of 7 per cent. per annum on the capital for the time being paid up thereon respectively, in priority to any dividends on any other shares of the company, and the right in the event of a winding-up to have the surplus assets applied in repayment of the capital paid up on such shares in priority to any distribution on any other shares in the capital for the time being of the company, but shall not confer any further rights to participate in profits or surplus assets. Provided, nevertheless, that in case of *winding up for the purpose of reconstruction or amalgamation* there shall be paid to the holders of the said shares in addition to the amount of the capital paid up thereon a bonus of 15 per cent. on their par value, which bonus shall also rank in priority to any distribution upon any other shares in the capital of the company."

By clause 160 of the articles of association the liquidators, in case of a winding-up, might with the sanction of an extraordinary resolution divide amongst the contributories in specie any part of the assets of the company.

By a trust deed (constituting 500,000*l.* debenture stock) dated August 5, 1902, and made between the Australasian Company of the one part, and the Ocean Company, thereinafter called "the present trustees," of the other part, the Australasian Company charged certain property in favour of the Ocean Company as trustees to secure the stock. By

BUCKLEY J.
1904
SOUTH AFRICAN SUPPLY AND COLD STORAGE COMPANY. *In re.*
WILD *v.* SAME COMPANY.

clause 10 of this deed the security was to become enforceable in certain events, one of which was: "If an order shall be made or an effective resolution shall be passed for the winding-up of the company." Condition 1, in the 1st schedule to the deed, was as follows: "At any time after the 30th day of June, 1912, the company may give to the stockholders not less than six calendar months' notice of its intention to redeem the stock at the rate of 105*l.* for every 100*l.* of the stock, or the company may at any date earlier than the 30th day of June, 1912, give to the stockholders a similar notice of its intention to redeem the stock at the rate of 107*l.* 10*s.* for every 100*l.* of the stock, and at the expiration of the notice the stock will be redeemed accordingly. Unless previously redeemed the stock will be redeemed when and so soon as the security hereby constituted becomes enforceable—that is to say, at the rate of 105*l.* for every 100*l.* of the stock in the event of the said security becoming enforceable by reason of a voluntary winding-up of the company for the purpose of reconstruction or amalgamation, but otherwise at the rate of 100*l.* for every 100*l.* of the stock; and as and when the stock ought to be redeemed in accordance with these presents the company will, subject to these conditions, pay to the several holders of the stock the redemption moneys therefor calculated at the rates respectively or one of the rates aforesaid as hereinbefore provided."

On February 27, 1902, the Australasian Company, which had just been incorporated, agreed with the Supply Company to purchase assets of the latter company, including its business and its business premises, but not including a very large amount of its assets, of the value of about 1,665,000*l.*, consisting of investments, cash, and other things. The consideration for what was purchased was 1,000,000*l.*, which was to be paid and satisfied as follows: As to 333,333*l.*, by the allotment to the Supply Company or its nominees of 333,333 fully paid ordinary shares in the Australasian Company; as to 150,000*l.* by the allotment to the Supply Company or its nominees of 150,000 fully paid preference shares in the Australasian Company; as to 116,650*l.*, by the allotment to the Supply

Company of 116,650*l.* debenture stock of the Australasian Company; and as to the balance of 400,017*l.* in cash.

On April 10, 1902, a deed was executed by which certain incumbrances of the Supply Company were taken off its assets and thrown upon a particular sum of 60,000*l.* which was set apart to answer them; but this did not affect the decision in the case.

On May 12, 1902, a company called "The Cold Storage Trust, Limited," was incorporated, with a capital of 618,000*l.*, divided into 618,000 (ordinary) shares of 1*l.* each—namely, twice the amount of the ordinary share capital of the Supply Company.

On February 17, 1903, the Cold Storage Trust increased its capital by the creation of 150,000 preference shares of 1*l.* each, equalling the amount of the preference capital of the Supply Company.

On August 11, 1902, certain heads of a proposed agreement (afterwards more formally entered into by the agreement of May 28, 1903, mentioned below) were entered into, the effect of which was that the Australasian Company was to sell to the Imperial Company, for 1,650,000*l.*, what the former company had bought from the Supply Company plus its own stock-in-trade and what was called its "cash working capital." The 1,650,000*l.* was equivalent to 1,000,000*l.*, the ordinary share capital of the Australasian Company; 500,000*l.*, the amount of its preference share capital and debenture stock; and 150,000*l.*, representing the goodwill of the Imperial Company, and set apart as payable to certain firms interested in the Imperial Company.

The heads of agreement did not provide that the Australasian Company should go into liquidation, but contained a provision (in clause 15) that that company should out of the assets to be transferred be entitled to retain 500*l.* for liquidation expenses. At a meeting of the Australasian Company held on September 19, 1902 (after the heads of agreement had been entered into and before the agreement of May, 1903, was executed), speeches were made by the chairman of the company and others shewing in detail that what was contemplated and recommended was a sale by the company to the Imperial

BUCKLEY J.
1904
SOUTH AFRICAN SUPPLY AND COLD STORAGE COMPANY, *In re.*
WILD *v.* SAME COMPANY.

Company for shares in and debenture stock of the Imperial Company to replace the shares in and debenture stock of the Australasian Company.

In view of the agreement of February 26, 1903, below referred to, a meeting of the Supply Company was held on December 29, 1902, when the chairman, in the course of his speech, referring to the proposed agreement, said that the meeting was the last annual general meeting of the company, as the next meeting to be held would be "to formally put the company into liquidation"; that if that agreement was entered into the company was to be liquidated, and shewed in detail how the 618,000 ordinary shares of the Cold Storage Trust were to answer the 309,000 ordinary shares in the Supply Company, and the 150,000 preference shares in the Cold Storage Trust were to answer the like number of preference shares in the Supply Company.

By an agreement dated February 26, 1903, and made between the Supply Company and the Cold Storage Trust, the former agreed to sell to the latter all its remaining assets (including its shares in the Australasian Company), with the exception of assets of the value of 295,085*l.*, which was rather more than sufficient (by a margin of about 40,000*l.*) to pay the debts of the Supply Company, which were not taken over by the Cold Storage Trust. The consideration was 768,000*l.*, payable as to 618,000*l.* in the 618,000 ordinary shares (fully paid up) of the Cold Storage Trust, and as to 150,000*l.* in its 150,000 preference shares (fully paid up), to be respectively allotted to the Supply Company or its nominees.

Prior to the agreement of May 28, 1903, the Imperial Company increased its capital from 650,000*l.* to 2,000,000*l.* by the creation of 1,350,000*l.* new shares of 1*l.* each.

The parties to the formal agreement of May 28, 1903, were the Imperial Company, the Australasian Company, the Supply Company, and the Cold Storage Trust, and the consideration as therein stated was 1,650,000*l.*, payable as to 1,150,000*l.* in fully paid ordinary shares of the Imperial Company of 1*l.* each (of which 150,000*l.* was to be allotted to the companies, firms, and persons named in a schedule), and as to the balance of

500,000*l.* in debentures of the Imperial Company, the 1,000,000 ordinary shares and the debentures to be allotted to the Australasian Company or its nominees.

Clause 21 of the agreement provided that the Australasian Company might "retain out of the assets hereby agreed to be sold by it to the Imperial Company the sum of 500*l.* for its liquidation expenses."

At extraordinary meetings of the Australasian Company held on May 27 and June 11, 1903, a special resolution was passed and confirmed simply that the company should be wound up voluntarily. At the meeting of May 27 speeches to the same purport as those on September 19, 1902, were made.

At extraordinary meetings of the Supply Company held on June 8 and July 3, 1903, a special resolution was passed and confirmed simply that that company should be wound up voluntarily. At the meeting of June 8, 1903, the chairman of the company in the course of his speech said: "We have concluded the agreement. As soon as the transfers are completed the 618,000 ordinary and the 150,000 preference shares will be handed over; they have already deposited them. Transfer of the property will not occupy very long, so that the shares will be available for distribution when we get into liquidation in the proportion of one preference share for one preference share to those who take them, and the distribution of two ordinary shares for every ordinary share of this company."

At an extraordinary general meeting of the Supply Company held on November 20, 1903, the following extraordinary resolution was passed: "That the liquidators of the company be, and they are hereby authorized to distribute in specie or kind amongst the contributories of the company, in the proportion of two shares for every ordinary share held in this company, the 618,000 ordinary shares of 1*l.* each (credited as fully paid up) in the capital of 'The Cold Storage Trust, Limited,' and which form part of the consideration for the sale mentioned and referred to in an agreement dated the 26th day of February, 1903, and made between the South African Supply and Cold Storage Company, Limited, of the first part, the Cold Storage Trust,

BUCKLEY J. 1904 SOUTH AFRICAN SUPPLY AND COLD STORAGE COMPANY, *In re.* WILD *v.* SAME COMPANY.

Limited, of the second part, and the South African and Australasian Supply and Cold Storage Company, Limited, of the third part, and so that each contributory shall be entitled to have his or her proportion thereof allotted to himself or herself or his or her nominee or nominees as he or she may elect, such election to be declared by notice in writing to the said liquidators within fourteen days after the passing of this resolution, or such further time as the liquidators may think proper to allow."

An action was brought by one Wild, on behalf of himself and the other debenture stockholders of the Supply Company, against that company and the Ocean Company, claiming a declaration that the stockholders were entitled to be paid off at the rate of 107*l.* 10*s.* per 100*l.*, and administration, so far as necessary, of the trusts of their debenture stock deeds of July 14, 1899, and April 10, 1902.

In an action brought by a debenture stockholder in the Australasian Company a similar question was raised.

In the winding-up of the Supply Company the liquidators took out an originating summons for the determination of the question whether the preference shareholders were entitled to receive a bonus of 15 per cent. on the par value of their preference shares.

In the voluntary winding-up of the Australasian Company an originating summons was taken out by the liquidators for the determination of the question whether the preference shareholders were entitled to receive a bonus of 15 per cent. on the par value of their preference shares. The question involved in the two actions and on the two summonses was, therefore, what amounted to a winding-up "for the purpose of reconstruction or amalgamation."

This question was argued before Byrne J., who reserved his judgment, but died without delivering it. The question was therefore reargued before Buckley J.

Cave, K.C., and *Ashton Cross*, for the plaintiffs (the debenture stockholders in the Supply Company and the Australasian Company) in both actions.

The Supply Company and the Australasian Company both went into voluntary winding-up "for the purpose of reconstruction or amalgamation," and the debenture stockholders are therefore entitled to the percentage bonuses given by the trust deeds. The Supply Company and the Australasian Company had by their memoranda of association the now usual power to sell the undertaking for shares and securities in another company. In pursuance of this power of the Supply Company it made two sales—one of its business and some of its other assets to the Australasian Company; and the other of its remaining assets, and what it had got from the Australasian Company, to the Cold Storage Trust, excepting from the latter sale assets valued at 295,085*l.*, retained for the purpose of paying debts—a large sum in itself, but small in proportion to the total value of the assets. The liabilities of the Supply Company were not taken over; but that is immaterial. Reconstruction may take place in three or four different ways; it is sufficient if the intention is that the old company shall in the result come to an end, and that its shareholders shall become the shareholders of the new company. In the case of the Supply Company there was clearly a "reconstruction," as that term is defined or described by text-writers —in Buckley on Companies, 8th ed. p. 446; Palmer's Company Precedents, 8th ed. Pt. I. pp. 1280 et seq.; Lindley on Companies, 6th ed. vol. ii. p. 1211. The fact that the resolution of the company is simply for voluntary winding-up, and that it does not mention reconstruction, is immaterial, if the intention is that the shareholders of the old company shall in substance reappear as the shareholders of the new company.

In the case of the Australasian Company the transaction was an amalgamation rather than a reconstruction. Amalgamation is defined or described in Buckley on Companies, 8th ed. p. 446; Palmer's Company Precedents, 8th ed. Pt. I. p. 1317; Lindley on Companies, 6th ed. vol. ii. p. 1200. [He also referred to *New Zealand Gold Extraction Co.* v. *Peacock* (1); *Hooper* v. *Western Counties and South Wales Telephone Co.* (2); *Pulbrook* v. *New Civil Service Co-operation.* (3)]

(1) [1894] 1 Q. B. 622. (2) (1892) 41 W. R. 84.
(3) (1877) 26 W. R. 11.

BUCKLEY J.

1904

SOUTH AFRICAN SUPPLY AND COLD STORAGE COMPANY, *In re.* WILD *v.* SAME COMPANY.

Astbury, K.C., and *Vernon*, for the ordinary shareholders of the Supply Company. It cannot be said that the Supply Company was wound up for the purpose of either amalgamation or reconstruction, as those terms have been defined by the Courts and the text-writers, and the percentages are therefore not payable.

Jenkins, K.C., and *C. A. Bennett*, for the preference shareholders of the Australasian Company. In this case there may not have been a winding-up for the purpose of reconstruction, but the object was evidently amalgamation; and if that was the object the preference shareholders are entitled to the percentage. To constitute amalgamation it is not necessary that the resolutions for winding-up should refer to amalgamation, and it is immaterial whether the shares to be taken by the selling company are to be taken in specie or not. The heads of agreement shew that a fusion of companies was intended—something which would in fact be an "amalgamation"—and what that transaction was called does not matter in the least. The whole history of what took place points in the same direction. No precise meaning can be attached to "amalgamation": *Wall* v. *London and Northern Assets Corporation.* (1) But primarily the word means that two things are fused together, each of them continuing in the sense that both go on together but in combination, the corporators of the two fusing corporations continuing to be interested in the concerns which are fused. Whatever test is applied, what occurred here was an amalgamation.

Buckmaster, K.C., and *Wells*, for the preference shareholders of the Supply Company.

Norton, K.C., and *Kirby*, for the liquidators of the Supply Company and the Australasian Company. There was no winding-up of either company for the purpose of reconstruction or amalgamation. The Supply Company was certainly not amalgamated with any other company, and several of the characteristics of its sales to the Australasian Company and the Cold Storage Trust are inconsistent with reconstruction—as, for instance, the exception of assets of large value, and the fact that its liabilities were not taken over.

(1) [1898] 2 Ch. 469.

Reconstruction is a term quite inapplicable to the transaction of the Australasian Company with the Imperial Company, for the latter was already an existing company. The Australasian Company had no business of its own, but was entitled to the benefit of a contract to buy the Supply Company's business, and it was the benefit of that contract which it sold to a third company. That was not an amalgamation. Moreover, amalgamation involves the taking over by the continuing company of the liabilities of the company which is to be extinguished—an element which is wanting here. Where the continuing company does not make itself liable for the selling company's debts, there is no guarantee that the shares of the former will be distributed amongst the shareholders of the latter—they may have to be sold on the market—and it is of the essence of amalgamation that the shareholders of the selling company should come in as shareholders of the continuing company under a contract between the two companies. *Wall* v. *London and Northern Assets Corporation* (1) and *Hooper* v. *Western Counties and South Wales Telephone Co.* (2) both support our view.

BUCKLEY J. There are here four matters—two applications being made as regards each of the two companies, which I will call the Supply Company and the Australasian Company. In the winding-up of each of these companies there is a summons raising a question as to the rights of the preference shareholders, and in the case of each company there is an action raising the same question as regards the debenture stockholders. That question is whether the company in each case has been wound up "for the purpose of reconstruction or amalgamation."

The only question I have to determine is whether, in the case of each of these two companies, there has or has not been a winding-up "for the purpose of reconstruction or amalgamation." Neither of these words, "reconstruction" and "amalgamation," has any definite *legal* meaning. Each is a commercial and not a legal term, and, even as a commercial

(1) [1898] 2 Ch. 469. (2) 41 W. R. 84.

BUCKLEY J. 1904 SOUTH AFRICAN SUPPLY AND COLD STORAGE COMPANY, *In re.* WILD *v.* SAME COMPANY.

term, bears no exact definite meaning. In each case one has to decide whether the transaction is such as that, in the meaning of commercial men, it is one which is comprehended in the term "reconstruction" or "amalgamation."

Beyond that, I have to consider whether the winding-up is "*for the purpose* of reconstruction or amalgamation." I cannot answer that question simply by reading the resolutions for liquidation and seeing whether they are expressed to be "for the purpose" I have named; I must go further and ascertain whether, as a matter of substance and of fact, the winding-up was arrived at for one of those purposes. [His Lordship referred to the memorandum of association of the Supply Company and clause 159 of its articles of association, adding with regard to the latter:—] That is to say, that, if the resolution so provided, such division might be made otherwise than in accordance with the legal rights of the members of the company, except where defined by its memorandum of association. [His Lordship then referred to the memorandum of association of the Australasian Company, the debenture stock issues of that company and the Supply Company, and the incorporation of the Imperial Company, and continued:—] There was a prospect of competition with the Imperial Company, and in that state of things, on February 27, 1902, the Australasian Company, which had just been incorporated, entered into an agreement to purchase from the Supply Company for the sum of 1,000,000*l.* (payable in cash and in preference shares, ordinary shares, and debenture stock of the Australasian Company) what was, shortly stated, the business and business premises of the Supply Company, but not including a very large quantity of assets of that company amounting to about 1,665,000*l.*, consisting of investments, cash, and various other things. That was what I call the first sale by the Supply Company. So far it has sold its business and some other property, but has retained a very large amount of its assets. [His Lordship then referred to the deed of April 10, 1902, and said that nothing turned upon that, and referred to the incorporation and amount of nominal capital of the Cold Storage Trust, and continued:—] I pause here

to point out that that figure of 618,000*l.*, the ordinary share capital of the Cold Storage Trust, is exactly twice the amount of the ordinary share capital of the Supply Company, which was 309,000*l.* Shortly afterwards, on February 17, 1903, the Cold Storage Trust increased its capital by creating 150,000 preference shares of 1*l.* each. Why it was incorporated without these shares no one can tell me—the omission was obviously a slip—but with its increased capital the Cold Storage Trust had an ordinary share capital exactly double the ordinary share capital of the Supply Company, and a preference share capital exactly equal to the preference share capital of that company, and it was formed for the purpose of the transaction which I am going to describe.

That being the state of facts, certain "heads of agreement" were executed on August 11, 1902, which were more formally entered into by an agreement of May 28, 1903, the effect of which was that the Australasian Company sold what it had bought from the Supply Company plus what it had added to the stock, and also what is called its "cash working capital," to this rival competing Imperial Company for 1,650,000*l.* That purchase price was equivalent to the share capital and debenture stock of the Australasian Company plus a sum of 150,000*l.* which—it is a significant fact—is in the heads of agreement set apart to be applied in payment of certain persons then interested in the Imperial Company, and which was to represent the goodwill of the Imperial Company or of those persons at that date.

Subsequently to that agreement, namely, on February 26, 1903, the Supply Company entered into what I call its second sale—an agreement for sale to the Cold Storage Trust, to which I will presently refer. At that time the Supply Company had already acquired this large number of shares in the Australasian Company, and the Australasian Company had sold its own business to the Imperial Company for shares in the Imperial Company; so that the Supply Company, through those successive derivative titles, had really become interested in the Imperial Company, having acquired a large shareholding

BUCKLEY J.
1904
SOUTH AFRICAN SUPPLY AND COLD STORAGE COMPANY, *In re.*
WILD *v.* SAME COMPANY.

interest in the Australasian Company, which had become the holder of many shares in the Imperial Company.

In that state of facts the Supply Company, on February 26, 1903, agreed to sell to the Cold Storage Trust all those assets, with the exception of what is, no doubt, a substantial sum—295,085*l.* That sale was of (*a*) all the shares which the Supply Company held in the Australasian Company, and (*b*) the assets, amounting to about 1,665,000*l.*, which had not been sold to the Australasian Company in February, 1902—in fact, all the assets of the Supply Company, except those amounting to 295,085*l.* which I have mentioned. The lastly mentioned sum was sufficient to answer, with a margin (which many of us would consider substantial, but in these figures is not large) of about 40,000*l.*, the debts of the Supply Company, which were not to be taken over by the Cold Storage Trust. In substance, this was a sale by the Supply Company to the Cold Storage Trust of all the Supply Company's assets, with the exception I have mentioned—substantially all its assets—for this purpose. The consideration for the sale was all the capital of the Cold Storage Trust—the 618,000 ordinary shares with which it was incorporated, and the 150,000 preference shares which it afterwards created.

The formal agreement of May 28, 1903, reproduced or ratified or finally carried out the terms entered into by the heads of agreement of August 11, 1902. There was a provision in clause 15 of the heads of agreement (reproduced in clause 21 of the ratifying agreement) that the Australasian Company should be entitled to retain out of its assets 500*l.* for liquidation expenses. There is nothing in the agreement or heads of agreement about going into liquidation, but there is that indication that those concerned were thinking of liquidation at the time, and were providing how the expenses of the liquidation were to be paid. I must go back a little in order to refer to the meetings at which these agreements were brought before the two companies. On September 19, 1902—that is to say, after the heads of agreement had been entered into, and before the agreement of May, 1903, was executed—there was a

meeting of the Australasian Company, at which speeches were made shewing exactly what the directors were contemplating—that a sale should be made so as to give, share for share, to the ordinary shareholders of the Australasian Company shares in the Imperial Company, and the debentures of the Imperial Company were to provide for the preference shares of and debenture stock of the Australasian Company. The agreement does not say they shall do that, but at the meeting what was intended to be done was detailed.

On December 29, 1902, there was a meeting of the Supply Company, which was then looking forward to the execution of the agreement of February 26, 1903, for the sale to the Cold Storage Trust, and then, as plainly as or more plainly than at the Australasian Company's meeting, it was pointed out that an agreement was to be entered into which was to be carried out by liquidation.

On May 27, 1903, a resolution was passed at a meeting of the Australasian Company simply "that the company be wound up voluntarily"—not "for the purpose of" anything, or any words of that kind—and explanatory speeches were made at that meeting. This resolution was confirmed as a special resolution on June 11, 1903.

The Supply Company met for the purpose of winding-up on June 8, 1903, when the scheme was again detailed in a speech from which I will read only this passage: "We have concluded the agreement. As soon as the transfers are completed the 618,000 ordinary shares and the 150,000 preference shares will be handed over; they have already deposited them. Transfer of the property will not occupy very long, so that the shares will be available for distribution when we get into liquidation in the proportion of one preference share for one preference share to those who take them, and by the distribution of two ordinary shares for every ordinary share of this company." It is quite plain from that that they went into liquidation for the purpose of doing the thing which is detailed in these agreements, and that they did not go into liquidation for the purpose of winding-up in the sense of realizing their assets and dividing the proceeds amongst themselves. They went into liquidation

BUCKLEY J. 1904 SOUTH AFRICAN SUPPLY AND COLD STORAGE COMPANY, *In re.* WILD *v.* SAME COMPANY.

for the purpose of giving effect to this particular form of enjoying their assets, namely, by getting for them shares in another company and dividing those shares, or having the potentiality of dividing them—if proper resolutions were passed by the several companies—among the shareholders in the way that is detailed in those speeches. I think I have said enough to shew that in my judgment the words "for the purpose of" are satisfied.

Then it remains to consider whether what was done was for the purpose of "reconstruction or amalgamation." What does "reconstruction" mean? To my mind it means this. An undertaking of some definite kind is being carried on, and the conclusion is arrived at that it is not desirable to kill that undertaking, but that it is desirable to preserve it in some form, and to do so, not by selling it to an outsider who shall carry it on—that would be a mere sale—but in some altered form to continue the undertaking in such a manner as that the persons now carrying it on will substantially continue to carry it on. It involves, I think, that substantially the same business shall be carried on and substantially the same persons shall carry it on. But it does not involve that all the assets shall pass to the new company or resuscitated company, or that all the shareholders of the old company shall be shareholders in the new company or resuscitated company. Substantially the business and the persons interested must be the same. Does it make any difference that the new company or resuscitated company does or does not take over the liabilities? I think not. I think it is none the less a reconstruction because from the assets taken over some part is excepted provided that substantially the business is taken, and it is immaterial whether the liabilities are taken over by the new or resuscitated company or are provided for by excepting from the scheme of reconstruction a sufficient amount to answer them. It is not, therefore, vital that either the whole assets should be taken over or that the liabilities should be taken over. You have to see whether substantially the same persons carry on the same business; and if they do, that, I conceive, is a reconstruction.

Now what is an amalgamation? An amalgamation involves, I think, a different idea. There you must have the rolling, somehow or other, of two concerns into one. You must weld two things together and arrive at an amalgam—a blending of two undertakings. It does not necessarily follow that the whole of the two undertakings should pass—substantially they must pass—nor need all the corporators be parties, although substantially all must be parties. The difference between reconstruction and amalgamation is that in the latter is involved the blending of two concerns one with the other, but not merely the continuance of one concern. An amalgamation may take place, it seems to me, either by the transfer of undertakings A. and B. to a new corporation, C., or by the continuance of A. and B. by B. upon terms that the shareholders of A. shall become shareholders in B. It is not necessary that you should have a new company. You may have a continuance of one of the two companies upon the terms that the undertakings of both corporations shall substantially be merged in one corporation only.

Now let us see what has happened in this case. First, as regards the Supply Company. By virtue of its two sales—first, to the Australasian Company for shares and stock of that company, and, secondly, by the sale of all those shares and all the Supply Company's other assets to the Cold Storage Trust for all the share capital of the lastly named company—the Supply Company (by which I mean that corporation) became entitled to all the shares in the Cold Storage Trust, which represented all the assets of the Supply Company with the trifling exception (having regard to the figures) of this 295,085*l.* The Supply Company had the power, by using clause 159 of its articles of association, to hold all those shares in the Cold Storage Trust as a corporator, and to distribute them amongst the corporators of the Supply Company; and in point of fact, by a resolution of November 20, 1903, the company resolved to divide the 618,000 shares amongst its ordinary shareholders. The result is that the undertaking which it had theretofore carried on is found reproduced in the hands of another corporation, the Cold Storage Trust, and the Supply Company now

BUCKLEY J. 1904 SOUTH AFRICAN SUPPLY AND COLD STORAGE COMPANY, *In re.* WILD *v.* SAME COMPANY.

has, and by virtue of its powers can give to its corporators the right to be all the corporators of the Cold Storage Trust. To my mind, that is a reconstruction of the Supply Company. You cannot say that it is an amalgamation for this reason, that the Cold Storage Trust had nothing to bring into an amalgamation. It had not a business of its own, but was acquiring its business by this purchase. It comes into existence as a company which is a reproduction, in a new form, of the Supply Company. That, I think, is a reconstruction of the Supply Company.

Then what happens with regard to the Australasian Company? That company, having become entitled by purchase to the business of the Supply Company, sells that business to the Imperial Company, which also has a business of its own. The persons interested in the Imperial Company were taking 150,000*l.* for the goodwill of that business. It seems to me that this is an amalgamation. Here the Australasian Company's business (formerly the Supply Company's business) and the Imperial Company's business became blended in the hands of the latter, and the corporators of the Australasian Company are contemplated as becoming holders, share for share, of shares in the Imperial Company to replace the shares held by them in the Australasian Company.

I have only one word to add—which had to be postponed till this time—with regard to the Supply Company. Inasmuch as by the sale of February, 1903, the shares in the Australasian Company which the Supply Company had become entitled to passed to the Cold Storage Trust, and by virtue of the sale by the Australasian Company to the Imperial Company they are reproduced in the form of shares in the Imperial Company, there is again a blending of the interests of the Cold Storage Trust and the Imperial Company, and the result of the whole complicated transaction is that everything that existed before is now found either in the Imperial Company or in the Cold Storage Trust, by the holding of shares in one or the other. I think that each of the cases before me comes within the words "a winding-up for the purpose of reconstruction or amalgamation." Briefly, both the Supply Company and the Australasian Company wound up—not for the purpose of discontinuing or parting with

their undertakings, but for the purpose of continuing to be the owners of their undertakings in an altered form.

The result is that the percentages claimed by shareholders and debenture stockholders are payable.

Solicitors for debenture-holders in the Supply Company and the Australasian Company: *Gerrish & Foster.*

Solicitors for preference shareholders in the Supply Company: *Ashurst, Morris, Crisp & Co.*

Solicitors for preference shareholders in the Australasian Company: *Bennett, Chance & Ferris.*

Solicitors for ordinary shareholders in the Supply Company: *F. Kimber Bull & Duncan.*

Solicitors for liquidators of both companies: *Mellor, Smith-Winby & Jones.*

F. E.

In re BOLTON ESTATES ACT, 1863.

[1903 B. 0147.]

Revenue—Estate Duty—Succession Duty—Settlement by Act of Parliament—Restriction against Alienation—Power of Jointuring—Power of Sale—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 58—*Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 5, *sub-ss.* 1, 2, 5; *s.* 22—*Succession Duty Act*, 1853 (16 & 17 *Vict. c.* 51), *ss.* 2, 4.

The power of sale conferred by s. 58 of the Settled Land Act, 1882, upon a tenant in tail in possession of lands settled by Act of Parliament with a restriction upon alienation does not make such a tenant in tail a person capable of alienating the lands so settled within the meaning of sub-s. 5 of s. 5 of the Finance Act, 1894, which provides that where lands are so settled by Act of Parliament that no one of the persons successively in possession thereof is capable of alienating the same, the property passing on the death of any person in possession of the lands shall be the interest of his successor therein, and such interest shall be valued for the purpose of estate duty in like manner as for the purpose of succession duty.

Estate duty payable under sub-s. 5 of s. 5 is payable out of income and not out of capital.

By a private Act passed in the reign of Henry VIII. to give effect to a family arrangement with reference to Lord Broke's estates, a portion of the estates was settled upon his two daughters A. and E. and the heirs of their bodies as co-parceners with cross-remainders between them, and it

JOYCE J.

1904

BOLTON ESTATES ACT, 1863, *In re.*

was provided that no tenant in tail should alienate the estates except for the purpose of jointuring a wife—an exception which the Court construed as implying a power in the tenant in tail under the existing law to jointure by will. Owing to the failure of the heirs of the body of A. the entirety of these estates had now become vested in the heirs of the body of E. The Crown claimed (1.) that estate duty was payable on the death of each tenant in tail in possession under sub-s. 5 of s. 5 of the Finance Act, 1894; (2.) that upon the grant of a jointure by will succession duty was payable by the widow, either under s. 2 or under s. 4 of the Succession Duty Act, 1853, in respect of one moiety of her jointure, on the footing that her interest was a succession derived as to one moiety from A., and as to the other moiety from E. as predecessor, it being conceded that as to the moiety derived from E. the succession duty was covered by the payment of estate duty as provided by s. 1 of the Finance Act, 1894.

Held, (1.) that sub-s. 5 of s. 5 of the Finance Act, 1894, applied; (2.) that the predecessor of the jointress was either her own husband, or E., the lineal ancestress of the husband, and that no succession duty was payable.

PETITION.

By the Broke Estates Act, 1535 (27 Hen. 8, c. xvi.), which was a private Act of Parliament passed in order to give effect to a family arrangement between Charles Blount, Lord Mountjoye and Lady Anne his wife, John Poulet and Elizabeth his wife—the ladies being the daughters of Robert Willoughby, Lord Broke, then deceased—of the one part, and Francis Dantrey and Blanche his wife, Foulke Gryvell and Elizabeth his wife—these two ladies being granddaughters of the said Lord Broke—of the other part, being an arrangement with reference to the landed estates of Lord Broke, it was enacted that the said Francis Dantrey and Blanche his wife as in her right, and the said Foulke Gryvell and Elizabeth his wife as in her right, should have to them and to the heirs of their bodies as co-parceners certain portions of the said estates as therein specified, with cross-remainders as between the said Blanche Dantrey and Elizabeth Gryvell and the heirs of their respective bodies, with an ultimate remainder over to the right heirs of the said Lord Broke for ever; and it was further enacted that the said Lord Mountjoye and Lady Anne his wife as in her right, and the said John Poulet and Elizabeth his wife as in her right, should have to them and to the heirs of their bodies as co-parceners certain other portions of the said

estates situate in the counties of Dorset, Devon, Cornwall, and Wilts (hereinafter referred to as "the Bolton estates"), with cross-remainders as between the said Anne Lady Mountjoye and Elizabeth Poulet and the heirs of their respective bodies, with an ultimate remainder to the right heirs of the said Lord Broke for ever. And it was further enacted that neither of the said parties above mentioned nor any future tenant in tail should thereafter alienate any of the estates so settled, "but only for the joynter of wyfe or wyfes, for term of lyfe or lyves of any husband that hath or shall marry any of them, or any of the heires that shall be inheritable to any of the same landes and tenements, or for terme of lyfe of any other person, or for years, or at wyll, after custome of the manour, yeldyng the true and auncyent rent of the same landes or tenementes so to him letten as is aforesaid."

Eventually, by reason of the failure of the heirs of the body of Anne, Lady Mountjoye, the entirety of the Bolton estates became vested in the heirs of the body of Elizabeth Poulet. By a private Act called the Bolton Estates Act, 1863 (26 & 27 Vict. c. vi.), after reciting that the estates settled by the Act of Henry VIII. were by virtue of that Act then vested as to one moiety in Henry, the second Duke of Cleveland, as tenant in tail in possession in co-parcenery with John William, Earl of Sandwich, and as to the other moiety in the said John William, Earl of Sandwich, as tenant in tail in possession in co-parcenery with the said Henry, Duke of Cleveland, it was enacted (s. 1) that the provisions of the Leases and Sales of Settled Estates Act, 1856 (19 & 20 Vict. c. 120), should apply to the present Act; but (s. 2) that no sale should be made after the expiration of twenty-one years from the passing thereof; and it was further enacted (s. 3) that with the consents therein mentioned it should be lawful for the Court of Chancery to order a partition of the said Bolton estates.

It was also provided (s. 9) that the powers in the original Act contained or implied of giving the said estates for the jointure of a wife or wives, or for a term of life or lives of any husband that had married any of the heiresses that should be inheritable to any of the same estates, might be exercisable

JOYCE J. 1904 BOLTON ESTATES ACT, 1863, *In re.*

either previously to and in contemplation of a marriage or after the completion or solemnization thereof, and either to the whole extent of the share or interest therein of the person exercising the powers or to the extent of a part only of such share or interest. The Act further provided (s. 10) that after partition the powers of leasing, selling, and jointuring might be exercised by the persons amongst whom the partition should be made in relation to the parts or shares allotted to them respectively.

Divers portions of the said Bolton estates were from time to time sold under the powers of this Act, and the proceeds were paid into court as thereby directed.

In 1869, in pursuance of an order of Stuart V.-C. dated March 18, 1869, a partition was made of portions of the said estates and of certain of the proceeds of sale of other portions; and in 1877, in pursuance of an order of Hall V.-C. dated November 17, 1876, a final partition of the estates and of the proceeds of sale was made. As the result of these partitions the whole of the unsold portions of the Devon and Cornwall estates and part of the proceeds of sale of other parts of the estates (hereinafter called the Cleveland moiety of the Bolton estates) were allotted to the Duke of Cleveland and his successors in title in severalty, the remainder of the estates and proceeds of sale being allotted to the Earl of Sandwich and his successors in title in severalty.

In 1899 and 1900 certain portions of the Cleveland moiety of the Bolton estates were taken by the Great Western Railway Company and by the corporation of Plymouth respectively under their statutory powers, and the proceeds were paid into court under the Lands Clauses Act.

On May 18, 1901, upon the death of Catherine Lucy Wilhelmina, Duchess of Cleveland, in whose favour the whole of the Cleveland moiety of the Bolton estates had been limited by her husband, the fourth Duke of Cleveland, by way of jointure, the said moiety of the said estates and funds passed, as to one-third to Francis William Forester, as to another third to Sybella Augusta Herbert, the wife of General the Hon. W. H. Herbert, and Miss Edith Dorothy Milbank, and as

to the remaining third to General Augustus William Henry Meyrick as co-parceners in tail under the Act of 27 Hen. 8.

General Meyrick died on March 26, 1902, having by a codicil dated May 31, 1901, appointed to his wife for life by way of jointure the whole of his share in the said estates. After his death the question was raised whether upon the true construction of the Act of Henry VIII. and the Bolton Estates Act, 1863, he had power by will or codicil to appoint the income of his share in these estates to his wife by way of jointure, but ultimately the appointment was upheld. (1)

This petition was presented by General and Mrs. Herbert, Miss Milbank, and certain persons who had been appointed by the Court trustees of the settlement created by the Act of Henry VIII. for the purposes of the Settled Land Acts, for payment out of the several funds in court.

At this date there were standing in court a sum of New Consols, representing the part of the proceeds of sale of the Bolton estates allotted to the Duke of Cleveland on the partitions of 1869 and 1877, together with a further sum of cash representing dividends which had been paid since the death of Catherine Lucy Wilhelmina, Duchess of Cleveland, and certain moneys on deposit in respect of the lands taken by the corporation of Plymouth and the Great Western Railway Company.

Questions having arisen with reference to the payment of estate duty and succession duty in respect of the Cleveland moiety of the Bolton estates, it was arranged that the Inland Revenue Commissioners should be made respondents to this petition for the purpose of trying those questions. The two principal questions were—(1.) whether estate duty in respect of the Cleveland moiety of these estates was or was not payable under sub-s. 5 of s. 5 of the Finance Act, 1894; and (2.) whether any and what succession duty was payable in respect of the jointure granted by General Meyrick to his wife. There was also a subsidiary question whether, assuming that estate duty was payable under sub-s. 5 of s. 5 of the Finance Act, 1894, it was payable out of income or out of corpus. Subject to

(1) [1903] 2 Ch. 461.

JOYCE J. 1904 BOLTON ESTATES ACT, 1863, *In re.*

the determination of these questions, the petition asked for payment out of the funds in court in the manner mentioned in the schedule thereto.

This case was twice argued.

Younger, K.C., and *Northcote*, for the petitioners. The first question arises under the Finance Act, 1894 (1), and is as to the amount of duty payable to the Crown. The Act of Henry VIII. provided that there should be a permanent and perpetual entail of the estates thereby settled with no general power of alienation. The Act of 1863 conferred a power of sale under the Leases and Sales of Settled Estates Act, 1856, but that power was to be exercised within twenty-one years of the passing of the Act, and has now determined. There is, however, a power of sale under the Settled Land Act, 1882, s. 58. The Crown suggests that this case falls within sub-s. 5 of s. 5 of the Finance Act, 1894, and says that these lands are so settled that no one of the persons successively in possession

(1) The material provisions of the Finance Act, 1894, are as follows:—

Sect. 5: "(1.) Where property in respect of which estate duty is leviable, is settled by the will of the deceased, or having been settled by some other disposition passes under that disposition on the death of the deceased to some person not competent to dispose of the property—

"(*a*) A further estate duty (called settlement estate duty) on the principal value of the settled property shall be levied at the rate hereinafter specified, except where the only life interest in the property after the death of the deceased is that of a wife or husband of the deceased; but

"(*b*) during the continuance of the settlement the settlement estate duty shall not be payable more than once.

"(2.) If estate duty has already been paid in respect of any settled property since the date of the settlement, the estate duty shall not, nor shall any of the duties mentioned in the fifth paragraph of the First Schedule to this Act, be payable in respect thereof, until the death of a person who was at the time of his death or had been at any time during the continuance of the settlement competent to dispose of such property.

"(5.) Where any lands or chattels are so settled, whether by Act of Parliament or Royal grant, that no one of the persons successively in possession thereof is capable of alienating the same, whether his interest is in law a tenancy for life or a tenancy in tail, the provisions of this Act with respect to settled property shall not apply, and the property passing on the death of any person in possession of the lands and chattels shall be the interest of his successor in the lands and chattels, and such interest shall be valued, for the purpose of estate duty, in like manner as for the purpose of succession duty."

thereof is capable of alienating the same, and that the estate duty upon any one of these tenants in tail coming into possession is payable upon the interest to which he succeeds—that is, practically a life interest. The petitioners contend that this sub-section is inapplicable, inasmuch as these lands are capable of alienation under the Settled Land Act, 1882, but that they are, nevertheless, "settled property" within sub-s. 2 of s. 5 of the Finance Act, 1894, which provides that after estate duty has once been paid in respect of any settled property since the date of the settlement no further duty shall be payable until the death of some person competent to dispose of the property. In this case no one will ever be competent to dispose of the property, because, under the interpretation clause of this Act, a sale under the Settled Land Act is not a disposition. The petitioners, therefore, contend that there ought to be one payment of estate duty under sub-s. 1 in respect of the capital value of the whole property passing on the death of the Duchess of Cleveland, and that that duty having been once paid, no further estate duty will ever be payable.

Vaughan Hawkins was then called upon to argue for the Inland Revenue Commissioners. Sect. 1 of the Finance Act imposes a duty called estate duty upon the principal value of all property, whether settled or not, which passes on death. Sect. 5 is the section which deals with estate duty on settled property. The object of the section is to give some measure of relief to settled property as against unsettled property in certain cases. The class of cases to which these provisions clearly apply is the case of a settlement containing more than one life interest, and the hardship which is the foundation of the section is this—that the occasion on which the property passes may be multiplied so that the person coming into possession would have to pay duty, which is always calculated on the principal value of the fee, although he comes in merely as a tenant for life and not as an unfettered owner. Therefore, where there are successive life interests a 1 per cent. settlement estate duty in addition to the estate duty is to be paid on the first occasion, and then no further duty

JOYCE J. 1904 BOLTON ESTATES ACT, 1863, *In re.*

is to be paid until, in effect, the settlement runs out. But this relief is obviously inapplicable to a perpetual settlement, and, therefore, by sub-s. 5 a different provision is made for that case, namely, the interest of the successor—that is, only the life interest, not the capital value—is taxed. It is submitted that there is no power to alienate under the settlement in this case. "Alienate" means alienating in such a way as to take the property out of the settlement. The power of sale conferred by s. 58 of the Settled Land Act is not a power to alienate within sub-s. 5: it is simply a power to shift the investment; and the donee of the power must exercise his power as a trustee for the persons interested under the settlement.

Younger, K.C., and *Northcote*, contra. It is said that in any case in which the vendor is not at liberty to take out of settlement the proceeds of sale of land or chattels there is no alienation of the land or chattels themselves within sub-s. 5. But the language of the sub-section does not bear out that contention. If that had been the intention of the sub-section, instead of "lands and chattels" there would have been the word "property," and instead of "capable of alienating" the term "competent to dispose" would have been used. Those are the terms used in all the other sub-sections of this section. The terms "property" and "competent to dispose" are defined in s. 22, and according to those definitions "property" includes real and personal property and the proceeds of sale thereof, and the power of sale conferred by the Settled Land Act is not a general power of disposition. But the Act contains no definition either of "lands and chattels" or of "alienate." If any tenant in tail under this settlement sells, under the powers of the Settled Land Act, a part of these estates or a picture, the land or the picture has ceased to be his, and according to the popular meaning of the word he has alienated that land or that picture, although, no doubt, he cannot alienate the proceeds of sale; and it has been held that the terms used in a taxing statute must be construed in their popular sense: *Lord Saltoun* v. *Advocate-General.* (1) This interpretation still leaves sub-s. 5

(1) (1860) 3 Macq. 659.

applicable to cases in which the land was purchased with money provided by Parliament in consideration of public services, for those cases are expressly excluded from the operation of s. 58 of the Settled Land Act.

If the Crown seeks to tax a subject, it must bring him within the strict letter of the law; it is immaterial that he may be within the spirit of the law; in a taxing statute there is no room for equitable construction: *Partington* v. *Attorney-General* (1); *Attorney-General* v. *Earl of Selborne.* (2)

Vaughan Hawkins, in reply. The dictum of Lord Campbell in *Lord Saltoun* v. *Advocate-General* (3) has not always been viewed with approval, and the right way of construing the words used in any Act of Parliament, whether a taxing statute or not, is to give them their proper and ordinary meaning. The difference in the language of sub-s. 5, no doubt, suggests that this sub-section was an afterthought, and was drafted at a later date; but this case falls within the very words of the sub-section. Clearly, proceeds of sale are included in chattels. Reading the language of the Legislature in its ordinary and proper meaning, the exercise of this power of sale under the Settled Land Act is not an alienation of the subject-matter of the settlement. There is no difference in s. 5 between disposition and alienation, and the Legislature expressly says that this is not a disposition.

The question was then argued whether any succession duty was payable under the Succession Duty Act, 1853 (4), in respect of Mrs. Meyrick's jointure.

(1) (1869) L. R. 4 H. L. 100, 122.

(2) [1902] 1 K. B. 388, 399, 400.

(3) 3 Macq. 659.

(4) The material provisions of the Succession Duty Act, 1853, are as follows:—Sect. 2: "Every past or future disposition of property, by reason whereof any person has or shall become beneficially entitled to any property or the income thereof upon the death of any person dying after the time appointed for the commencement of this Act, either immediately or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation, and every devolution by law of any beneficial interest in property, or the income thereof, upon the death of any person dying after the time appointed for the commencement of this Act to any other person, in possession or expectancy, shall be deemed to have conferred or to confer on the person

JOYCE J.
1904
BOLTON ESTATES ACT, 1863, *In re.*

Vaughan Hawkins, for the Inland Revenue Commissioners. The power of jointuring is a limited power within s. 4 of the Succession Duty Act, 1853, and in the case of a limited power it is the person who creates the power who is the predecessor. To ascertain that, reference must be made to the Act of Henry VIII. Under the Succession Duty Act, 1853, on General Meyrick's death there was, within the words of s. 2, clearly a disposition taking effect in favour of his wife. Upon that succession duty is payable by the person taking under the disposition—that is, the wife—and then the question is who is the predecessor. There can be only two views as to who are the persons creating the power. One is that they were all the four ladies who joined in the Act of Henry VIII., in which case s. 13 of the Succession Duty Act would apply. But the better view is that the power over the estates in question in these proceedings was created by Lady Mountjoye and Elizabeth Poulet. Elizabeth Poulet being a lineal ancestress of General Meyrick, one-half of the estates is franked from succession duty by the payment of estate duty; but Lady Mountjoye was not a lineal ancestress, and therefore the other moiety remains liable.

[*Younger, K.C.* I shall submit, first, that there was no predecessor at all, and, secondly, that there was no disposition.]

There was here in effect a conveyance by these four people

---

entitled by reason of any such disposition or devolution a 'succession'; and the term 'successor' shall denote the person so entitled; and the term 'predecessor' shall denote the settlor, disponer, testator, obligor, ancestor, or other person from whom the interest of the successor is or shall be derived."

Sect. 4: "Where any person shall have a general power of appointment, under any disposition of property taking effect upon the death of any person dying after the time appointed for the commencement of this Act, over property, he shall, in the event of his making any appointment thereunder, be deemed to be entitled, at the time of his exercising such power, to the property or interest thereby appointed as a succession derived from the donor of the power; and where any person shall have a limited power of appointment, under a disposition taking effect, upon any such death, over property, any person taking any property by the exercise of such power shall be deemed to take the same as a succession derived from the person creating the power as predecessor."

by way of compromise ; and whether or not it was confirmed by Act of Parliament is absolutely immaterial to the question whether there was a disposition or whether there was a predecessor. The Act of Henry VIII. is to be construed in the same way as a deed of family arrangement, and the creation of the power of jointuring is part of the arrangement and takes effect precisely as if the parties had been able to make the arrangement without the necessity of an Act of Parliament: Hardcastle on Statutory Law, 3rd ed. 488–9 ; *Hornby* v. *Houlditch* (1) ; *Eton College* v. *Bishop of Winchester*. (2) There is therefore here both a disposition and a predecessor. That being so, the claim of the Crown may be based either upon s. 4 or upon s. 2 ; the effect is the same in either case. The authorities establish—(1.) that the person who takes under the execution of the power becomes entitled by reason of the original disposition within s. 2 ; (2.) that whenever there is a disposition within s. 2 under which duty is payable the predecessor is always the person out of whose estate the interest in question comes, not the person who may have bargained to get it : *Attorney-General* v. *Floyer* (3) ; *Charlton* v. *Attorney-General* (4) ; *In re Lovelace's Settlement* (5) ; *Brown* v. *Attorney-General* (6) ; Farwell on Powers, c. xiv. It follows that Elizabeth Poulet cannot be the predecessor as to more than one-half of the jointure. The fact that Lady Mountjoye's estate came to an end is immaterial to the question of predecessorship, because that depends, not on the interest taken under the settlement, but on the interest existing before the settlement. The jointure does not come out of anybody's estate tail, but takes effect as if it had been limited in the settlement itself ; it operates as a defeasance of the existing limitations.

Younger, *K.C.*, and *Cave*, for Mrs. Meyrick. There is here no person who created the power as predecessor within s. 4. At the time when the Act of Henry VIII. was passed, the parties could not by agreement have created this power by any means known to the law so as to preserve the inalienability of

(1) (1737) Cited in 1 T. R. 93, n.
(2) (1774) 3 Wils. 483.
(3) (1862) 9 H. L. C. 477.
(4) (1879) 4 App. Cas. 427.
(5) (1859) 4 De G. & J. 340.
(6) (1898) 79 L. T. 572.

JOYCE J. 1904 BOLTON ESTATES ACT, 1863, *In re.*

the entail: see *In re Bolton Estates.* (1) It could not have been exercised by suffering a recovery, since that would or might have involved extinguishing the entail absolutely, nor by levying a fine, because that would not be valid unless there were issue, and this was intended to be valid whether there were issue or not. This power, therefore, must have been created by Parliament. The terms "predecessor" and "disposition" in the Succession Duty Act are connected terms, and in *Lord Advocate* v. *Jamieson* (2) it was seriously doubted by the Lord President whether an Act of Parliament could be a disposition for the purposes of the Succession Duty Act; and it is apprehended that the reason for that doubt was that there could not be a disposition apart from some person as predecessor.

The same argument equally applies whether the claim is based on s. 4 or on s. 2.

Assuming that there was a disposition and a predecessor, Elizabeth Poulet was the predecessor. The power now in question was not a power over the original fourth only, nor was it a power conferred by the joint effect of all the four parties over every part of the estates, but it was a power conferred by each ancestress upon the heirs of her body over any portion of the property which might ultimately devolve upon them. The bargain was that Elizabeth Poulet and Lady Mountjoye each took under the compromise an estate tail in a moiety in possession of the Bolton estates plus an estate tail in the other moiety in remainder. Lady Mountjoye's share under the bargain has disappeared. Treating this jointure as if it were inserted in the Act, it is a jointure derived out of Elizabeth Poulet's estates. It is her estate tail in the whole which is defeated by the jointure. This being a case of a limited power, it has been held that s. 2 does not apply to it, but that it is governed by s. 4: *In re Lovelace's Settlement.* (3) Under that section, to enable the Crown to succeed, it must be shewn that Lady Mountjoye was the person creating the power as to one moiety, although this was a power to the male heirs of Elizabeth Poulet to jointure their wives, and consequently a

(1) [1903] 2 Ch. 461. (2) (1886) 13 R. 737.
(3) 4 De G. & J. 340, 350.

power with which Lady Mountjoye had no concern. The person who created the power was the person who bargained for the power, and the person who bargained for the power for the heirs of the body of Elizabeth Poulet must have been Elizabeth Poulet herself. Whichever section applies, the result is the same.

Vaughan Hawkins, in reply. In every case it is the law which enables one to create a power, but it is not the law which creates the power, and it is immaterial whether the power is created under the existing law, or whether a special Act of Parliament is required for that particular case. The dictum of the Lord President in *Lord Advocate* v. *Jamieson* (1) was not indorsed by the other judges who took part in that decision, and it was not necessary to the decision of the case, because there was there no succession. This was obviously a family arrangement, and it cannot be supposed that the King insisted on this power of jointuring being inserted as a condition of giving his consent.

The question whether the estate duty was payable out of capital or income was then argued.

Vaughan Hawkins, for the Inland Revenue Commissioners. The fair construction of sub-s. 5 of s. 5 of the Finance Act, 1894, upon this question is that the property passing is the property to be charged, and, whether the interest which devolves at law upon the successor is a tenancy for life or a tenancy in tail, in reality his interest is only a tenancy for life, inasmuch as the estate tail is incapable of being barred. Therefore this duty is chargeable on income.

Younger, K.C., contra. Notwithstanding the words of sub-s. 5 of s. 5 of the Finance Act, it is submitted that the duty payable under this sub-section is charged against the capital and not against the income. The general scheme of the Act is that the estate duty shall be a charge on the whole property passing on the death—that is, on the corpus. Whether it is paid by the executors or by a limited owner, it comes out of

(1) 13 R. 737.

JOYCE J. 1904 BOLTON ESTATES ACT, 1863, *In re.*

the corpus of the property. Sub-s. 5 of s. 5 only says that the interest is to be valued for the purpose of estate duty in like manner as for the purpose of succession duty; it does not say that it is to be paid in like manner. Having once arrived at the value of the succession under this sub-section, there is nothing in the sub-section to say that the duty is to be charged otherwise than in accordance with the general scheme of the Act.

Vaughan Hawkins, in reply. The plain effect of the words of sub-s. 5 is totally to alter the scheme of the Act by providing that for all purposes of the sub-section the property passing on the death shall be, not the corpus, but the interest of the successor, and that interest is practically nothing more than an estate for life.

Ashworth James, for the executor and heirs of General Meyrick, and for the executors of the Duchess of Cleveland, also argued in opposition to the claims of the Crown.

Benn, for F. W. Forester.

R. J. Parker, for the Plymouth Corporation.

Medd, for the Great Western Railway Company.

Cur. adv. vult.

April 30. JOYCE J., after referring for the general facts to *In re Bolton Estates* (1), on which the statement of facts in this report is founded, continued as follows:—Two questions now arise, both in reference to the duties claimed by the Inland Revenue Commissioners. The first question is whether s. 5, sub-s. 5, of the Finance Act, 1894, applies to the estates held under the limitations of the Act 27 Hen. 8 (The Broke Estates Act), or in particular to the Cleveland moiety or portion of those estates which has been held in severalty since the partitions made in 1869 and 1877. [His Lordship then read s. 5, sub-s. 5, of the Finance Act, 1894.]

Now it cannot be denied that the lands in question were originally so settled by Act of Parliament that no one of the persons successively in possession thereof was capable of

(1) [1903] 2 Ch. 461.

alienating the same, for it was not argued that the partial and temporary alienation, if it can be properly so called, that was allowed for the purpose of jointuring or leasing constituted such an alienation as is referred to in the sub-section I have read. But it was contended that, inasmuch as the Settled Land Act, 1882, enables each tenant in tail to sell or exchange under the restrictions and generally in the manner and with the result provided by that Act, although upon a sale the proceeds remain subject to the trusts of the settlement, these Cleveland estates were not at the date of the Finance Act, 1894, and are not now, so settled that no one of the persons successively in possession thereof is capable of alienating the same.

Upon consideration I have come to the conclusion that a sale or exchange by a tenant in tail of such an estate as this under the provisions of the Settled Land Act is not an alienation of the estates in the popular sense of the term, and that such a fiduciary power of sale and exchange does not make the tenants in tail capable of alienating the lands in the sense in which that term is used in s. 5, sub-s. 5, of the Finance Act.

It was further contended that the estate duty, if it be payable, was payable out of the corpus or capital value of the estates. But there does not appear to me to be any reasonable ground for this contention. In my opinion the duty is payable out of what under the Act is the property passing upon the death of the person in possession of the estates, that is to say, the interest of the successor therein, such interest being valued as by the statute in that behalf provided.

Another question that arises is whether any and what succession duty is payable by a widow in respect of a jointure appointed or granted to her by her husband, a tenant in tail of the estates, or of a portion or share of the estates settled by the Broke Estates Act.

Every such tenant in tail, as it appears to me, had the right and was able, quite independently of any of the provisions of the Broke Estates Act, to create a jointure in favour of his widow by the execution of a disentailing assurance duly enrolled. If this course were adopted, I do not see how

JOYCE J. 1904 BOLTON ESTATES ACT, 1863, *In re.*

succession duty could be payable in respect of such jointure, having regard to the existence of the relation of husband and wife between the predecessor and the successor. But it was said that when the jointure is created by will or by deed without enrolment, this, having regard to the terms of the decision of the Court of Appeal, was an exercise of a limited power, and that consequently under s. 4 of the Succession Duty Act the widow took her jointure as a succession derived from the person creating the powers, who, in the circumstances of the case, was asserted to be, as to one moiety, the Lady Mountjoye who under the limitations of the Act of Henry VIII. took the first estate tail since determined in (inter alia) a moiety of the Broke estates. I am unable to accede to this argument. I think that the power of jointuring possessed by the Duke of Cleveland and by General Meyrick was not as to a moiety or at all created by Lady Mountjoye, or indeed by any other of the persons named in the Act of Henry VIII.

It was subsequently contended that at all events the Duchess of Cleveland and Mrs. Meyrick took their jointures as a succession within s. 2 of the Succession Duty Act, and that here again Lady Mountjoye was in each case the predecessor as to a moiety, so that succession duty at the rate of three per cent. would be payable in respect of a moiety of the jointure. To hold that Lady Mountjoye, who died certainly more than three hundred years ago, must as to a moiety of these estates be considered as the settlor from whom all persons taking are to be deemed to have derived title down to the extinction of the estates tail limited by the Act would be a very strange conclusion : see *Earl of Zetland* v. *Lord Advocate* (1), per Lord Hatherley. Upon the whole, I think that with respect to each jointure the predecessor or person from whom the interest of the jointress was derived was her own husband, in which case no succession would be payable, or perhaps Elizabeth Poulet, the ancestress whose estate tail devolved upon the husband, in which last case, by reason of the provision at the end of s. 1 of the Finance Act, 1894, no succession duty could now be levied. In other words, I am of opinion that no such

(1) (1878) 3 App. Cas. 505, 514.

duty was payable by the late Duchess of Cleveland or is payable by Mrs. Meyrick in respect of her jointure. I do not consider the decision of the Court of Appeal to be that each tenant in tail who created a jointure for his wife by the execution of a disentailing assurance was only enabled to do so by virtue of a limited power of appointment created more than three hundred and fifty years ago either by Lady Mountjoye or by any one else named in the Broke Estates Act. But the decision, so far as I understand it, was that what the tenant in tail had clearly the right and power to do by a disentailing assurance could equally well be done and with precisely the same result by a will, or I suppose by a deed without enrolment. The result is that in my opinion the succession duty claimed is not payable.

Solicitors: *Trower, Still, Freeling & Parkin; Sir F. C. Gore, Solicitor to the Inland Revenue; Ford, Lloyd, Bartlett & Michelmore; Williams & James; Walfords; Kennedy, Ponsonby & Ryde; Sharpe, Parker, Pritchards, Barham & Lawford, for J. H. Ellis, Town Clerk, Plymouth; R. R. Nelson.*

H. B. H.

C. A.
1904
July 8.

McGRUTHER *v.* PITCHER.

[1903 M. 3250.]

Sale of Goods—Conditions as to Resale attached—Notice—Right of Purchaser to disregard Conditions.

On the sale of goods a condition as to the price at which they may be resold cannot, in the absence of agreement, be imposed on the purchaser, even though he bought with notice of the condition.

A retail trader bought from the agent of the licensee of a patent an article manufactured by the licensee under the patent. On the inside of the lid of a box in which the article was packed was printed a condition that the goods were not to be resold at less than a specified price. The retail trader had sold some of the goods at less than the specified price. In an action by the licensee to restrain the retailer from so doing:—

Held, that, even if the retailer bought with notice of the condition, it could not be enforced against him.

Decision of Farwell J. reversed.

Decision of Swinfen Eady J. in *Taddy & Co.* v. *Sterious & Co.*, [1904] 1 Ch. 354, approved and adopted.

APPEAL from a decision of Farwell J.

The plaintiffs were rubber manufacturers at Preston; the defendant was a boot and shoe retailer at Brixton.

By their statement of claim the plaintiffs alleged that they were the sole manufacturers of the "Palatine Revolving Rubber Heel Pad" under a licence from a Mr. Roberts, who was the owner of the Wood-Milne Patent for the article, and they alleged that their revolving heel pads were well known in the trade and had a very extensive sale.

The statement of claim contained the following paragraphs:—

"(4.) The plaintiffs sell and dispose of their said revolving heel pads on the following conditions of sale, viz.:—

"'These revolving heel pads, whether bought directly from us or from any dealer, are sold on the express agreement that the same shall not be retailed at less than the following prices, viz.:—

"'Ladies' 10*d.* per pair.

"'Gent's 1*s.* per pair.

And shall not be resold except subject to these conditions as a term of sale.

"'The acceptance of the goods by any purchaser will be deemed to be an acknowledgment that they are sold to him on these conditions and on these conditions only, and that he agrees with the vendors (as our agents in this respect) to be bound by the same.

"'These revolving heel pads are supplied to a dealer on the above express agreement, and also on the additional terms that these conditions shall remain attached to every package sold wholesale, and shall form part of the terms upon which every such dealer resells every such package.'

"(5.) The plaintiffs' course of business in the sale and disposal of their said revolving heel pads has always been and is still to pack them in boxes, and on the inside of the lid of each box are printed in large type the said conditions of sale upon which the said revolving heel pads are sold.

"(6.) The plaintiffs dispose of considerable quantities of these said revolving heel pads to factors in London and elsewhere for resale by them. All of such revolving heel pads are packed in boxes with the said conditions of sale printed as aforesaid."

The plaintiffs alleged that the defendant had purchased from Charles Howes, one of their factors, some of their revolving heel pads, and that when he made the purchase he was orally informed by Howes of the conditions upon which the pads were sold to him and accepted by him.

Notwithstanding this the defendant had sold the pads at prices less than those mentioned in the conditions, and he threatened and intended to continue so doing.

The plaintiffs claimed an injunction to restrain the defendant from selling rubber heel pads manufactured by the plaintiffs, and purchased by him either directly or indirectly, at less prices than those mentioned in the conditions.

The defendant did not deny that he had sold a few of the plaintiffs' pads at prices lower than those mentioned in the conditions, but he said that when he made the purchase he was not informed by Howe of the conditions and had no notice of them. He did not admit that the conditions were binding on him or that he ever entered into any contract with the

C. A. 1904 McGRUTHER v. PITCHER.

plaintiffs regulating the price at which he might sell the pads. And "the defendant will also contend that the said alleged conditions are illegal and void as being in restraint of trade."

At the trial of the action Farwell J. granted an injunction as claimed by the plaintiffs, but limited its duration to the period of the continuance of the patent.

The defendant appealed.

Bramwell Davis, K.C., and *W. M. Cann*, for the defendant.

The action is founded on breach of contract, and Farwell J. has really treated it as if it were an action for infringement of the conditions on which a licence to use the patent was granted. The patentee is not a party to the action. It is submitted that the plaintiffs are not entitled to any relief. The defendant has not entered into any contract with the plaintiffs to observe the conditions as to sale of the article, and in the absence of a contract no conditions can be imposed on the resale of goods by a person who has bought them out and out, even though he bought them with notice of the conditions: *Taddy & Co.* v. *Sterious & Co.* (1)

McCall, K.C., and *T. E. Mansfield*, for the plaintiffs. In *Incandescent Gas Light Co.* v. *Cantelo* (2) Wills J. said that conditions as to the use of an article can be imposed on a purchaser with notice at the time of his purchase. In that case it was held that the defendant knew of no restriction upon the use of the article until after he had made the purchase, and on that ground the action was dismissed. In the present case, it is submitted, the evidence proves that the defendant bought with notice of the condition, and he is therefore bound by it.

VAUGHAN WILLIAMS L.J. In my judgment this is both in substance and in form an action for breach of contract. So treating it, I suppose no one will deny the authority of *Price* v. *Easton* (3), in which it was decided that "an action for breach of contract must be brought by the person from whom the consideration moved"; and that is confirmed by *Tweddle* v. *Atkinson*. (4)

(1) [1904] 1 Ch. 354.
(2) (1895) 12 Rep. Pat. Cas. 262, 264.
(3) (1833) 4 B. & Ad. 433.
(4) (1861) 1 B. & S. 393.

Now Mr. McCall very properly and frankly admitted that if an action were brought for the price of these heel pads it could only be brought by Howes. But he said that the plaintiffs, who are licensees from Roberts, the owner of the patent, are entitled to sue for the breach of contract. I cannot assent to that proposition. It is said that the defendant may be sued for breach of the condition as to the prices at which the pads are to be sold. Why? Because it is said the defendant bought with notice of that condition. Even if the defendant did buy with notice of the condition, I entirely deny that this would give any rights to a person who was not a party to the bargain. An attempt of this sort was made in *Taddy & Co.* v. *Sterious & Co.* (1) The head-note of that case is as follows: "T. & Co., manufacturers of tobacco, sold packet tobaccos subject to printed terms and conditions fixing a minimum price below which they were not to be sold, and containing the following proviso: 'Acceptance of the goods will be deemed a contract between the purchaser and T. & Co. that he will observe the stipulations.'" (A much stronger case, be it observed, than the present.) "'In the case of a purchase by a retail dealer through a wholesale dealer, the latter shall be deemed to be the agent of T. & Co.' T. & Co. sold to N., who resold for his own profit to S. & Co. S. & Co. had notice of the conditions, but sold to the public at a price below the stipulated minimum:—*Held*, that there was no contract between T. & Co. and S. & Co. which T. & Co. could enforce, and that conditions cannot be attached to goods so as to bind all purchasers with notice." One need only look at paragraph 5 of the statement of claim in the present case to see that the pleader meant to affirm just the contrary to the decision of Swinfen Eady J. in *Taddy & Co.* v. *Sterious & Co.* (2) That paragraph contains really the gist of this action. [His Lordship read paragraph 5, and continued:—]

The plaintiffs say that because the defendant had notice of these conditions, although he entered into no contract whatsoever directly or indirectly with the plaintiffs, they can sue him for the breach of the conditions. I do not agree, and I think that the decision of Swinfen Eady J. was perfectly right.

(1) [1904] 1 Ch. 354. (2) [1904] 1 Ch. 358.

C. A. 1904 McGRUTHER v. PITCHER. Vaughan Williams L.J.

He said (1): "Secondly, they contended that the goods were sold subject to certain conditions, and that, even if Netten or any one else had purported to sell them free from the conditions, Sterious & Co., having notice of the conditions, could not sell goods except according to the conditions, and the plaintiffs were entitled to restrain them from doing so. With regard to this last contention, there is a short answer. Conditions of this kind do not run with the goods, and cannot be imposed upon them. Subsequent purchasers, therefore, do not take subject to any conditions which the Court can enforce. If there was a breach of contract, the plaintiffs could no doubt sue. The question remains, therefore, whether there was any contract. There was no direct contract between Sterious & Co. and Taddy & Co., and the question does not arise as to the effect of a sale by Taddy & Co. direct to a retail trader subject to these terms as to minimum retail price." In my opinion that is perfectly sound, and I think the present plaintiffs have no cause of action. I desire to add that the case does not appear to have been presented to Farwell J. in the way in which it has been presented to us. Farwell J. seems to have dealt with the action as if it were brought to enforce the rights of the patentee through his licensees. I say nothing as to those rights, because in my judgment this is simply an action for breach of contract, and the plaintiffs were not parties to the contract.

ROMER L.J. I have arrived at the same conclusion.

I have tried in vain to see on what ground this case could be successfully based by the plaintiffs, and I am bound to say that I cannot find any secure ground.

In the first place, this case is not one in which the plaintiffs can be fairly regarded as seeking to enforce some patent rights which are vested in them. I can find no trace of such a case. The plaintiffs certainly say that the article is patented, but they state that they are mere licensees to manufacture it, and, as I gather also, to sell it. They do not say that as licensees they cannot do that; and if they could, so far as I can see, the

(1) [1904] 1 Ch. 358.

person who would have a right to complain would be the patentee. The plaintiffs do not say that any of the rights of the patentee are vested in them beyond what they have as licensees. At any rate I cannot find any case established which would justify the Court in giving the plaintiffs relief on the footing of patent rights. That being so, they must succeed if at all on some other ground.

Can the plaintiffs succeed on the ground that they are selling goods, and that they purported to attach a condition to the resale of the goods, and that the defendant was informed of this condition when he purchased the goods? Clearly, to my mind, they cannot. A vendor cannot in that way enforce a condition on the sale of his goods out and out, and, by printing the so-called condition upon some part of the goods or on the case containing them, say that every subsequent purchaser of the goods is bound to comply with the condition, so that if he does not comply with the condition he can be sued by the original vendor. That is clearly wrong. You cannot in that way make conditions run with goods.

The only other possible ground for the action is contract. Have the plaintiffs succeeded in shewing that they have entered into a contract with the defendant? The evidence utterly fails to prove any such contract. On the contrary, so far as I can see, the defendant has throughout said that he always intended to sell the pads without regard to the conditions, and I certainly cannot find any evidence that he agreed with his vendor to comply with the conditions. And even if the defendant had so contracted with his vendor, I should have a difficulty in holding that that would constitute a contract between the defendant and the plaintiffs. Even if the intermediate vendor was the agent of the plaintiffs, I doubt very much whether the plaintiffs could maintain the action; but I need not consider that case. In fact, I cannot find any intermediate contract between the defendant and his vendor.

That being so, the ground of contract fails, and, as I have already said, I can find no sure ground on which to rest the plaintiffs' case. In my opinion the action fails, and the appeal must be allowed.

C. A. 1904 McGRUTHER v. PITCHER.

COZENS-HARDY L.J. I am of the same opinion. On the evidence it is plain that there was no direct contract between the plaintiffs and the defendant when he purchased these goods. He purchased the goods, not from the plaintiffs, but from Howes. The defendant and Howes were the only parties to that contract of sale. If there has been any breach of the terms of that contract Howes is the only person who can sue in respect of it, and, as it seems to me, it is in no way relevant to say that Howes, when he bought the goods from the plaintiffs, bought them subject to a condition, of which the defendant had notice when he bought the goods from Howes. On that point I have nothing to add to what Swinfen Eady J. said in *Taddy & Co.* v. *Sterious & Co.* (1)

I cannot help thinking that in the argument in the Court below some confusion was introduced by reference to patent rights. Now this action is neither in form nor in fact an action by a patentee claiming an injunction to restrain an infringement of his patent. In such an action it is open to the defendant to plead a licence by the plaintiff. That licence may be express, or it may be implied from the sale by the patentee of the patented article, but, if the defendant pleads a licence, then it is competent for the plaintiff to reply, "The licence which I granted is a limited licence, and you, the person who has now got the patented article, were aware it was only a limited licence, and you cannot therefore defend yourself against my claim for an infringement of my patent, because you are going outside the licence which to your knowledge I gave with reference to this article." Such a case would not depend upon any condition running with or attaching to the article. It would depend only upon the limits of the licence which the patentee had granted when he first parted with the goods.

For these reasons I think the judgment of Farwell J. cannot be supported, and the appeal must be allowed with costs.

Solicitors: *Tippetts; Chester & Co., for W. Preston, Preston.*

(1) [1904] 1 Ch. 354.

W. L. C.

BRINCKMAN *v.* MATLEY.

C. A.
1904
BUCKLEY J.
Jan. 14, 15, 16, 18, 23.
C. A.
July 13, 14.

[1903 B. 3169.]

Seashore—Foreshore—Public Right of Bathing.

The public have no common law right to use the foreshore or to pass and repass thereon for the purpose of bathing in the sea, whether the foreshore is the property of the Crown or of a private owner.

Blundell v. *Catterall*, (1821) 5 B. & Al. 268; 24 R. R. 353, followed.

THE plaintiffs, the trustees of the Marquis Conyngham, and the Marquis, who was an infant and sued by a next friend, were the owners of the manor of Minster in the Isle of Thanet. By this action the plaintiffs claimed a declaration that the Marquis was entitled to a tract of foreshore lying between the ordinary high water-mark and the ordinary low water-mark of the sea extending from the northern boundary of Broadstairs Harbour to Hackendown Point, in the Isle of Thanet, as parcel of the manor of Minster and thereto belonging or held therewith. And the plaintiffs also claimed an injunction to restrain the defendant, his servants, agents, and workmen, from bathing from the said foreshore or any part thereof, and from wrongfully entering upon the said foreshore or any part thereof for that purpose.

The manor of Minster was an ancient manor, formerly belonging to the Abbey of St. Augustine, near Canterbury, which was dissolved before the making of the Royal Charter hereinafter mentioned, and from time immemorial the manor had comprised the said foreshore.

By a Royal Charter granted in the ninth year of James I., and dated December 24, 1611, the manor, including the foreshore, was granted by the Crown to the plaintiffs' predecessors in title, and the plaintiffs were in possession of the manor and the foreshore.

The defendant was the head master of St. Saviour's Elementary School, Poplar, Middlesex, and in July, 1903, he came with about 200 boys belonging to the school to a camp

C. A. 1904

BRINCKMAN v. MATLEY.

situate on the cliffs immediately above a bay, called Joss Bay, which formed part of the foreshore.

The camp was placed on land adjoining Joss Bay and forming part of Joss Farm, which belonged to Sir Alfred Harmsworth, a customary freehold tenant of the manor at a quit-rent, and was placed there by his permission.

The defendant remained in the camp with the boys, who were under his care and control, for about two months, and during that period the defendant and the boys, without the consent of the plaintiffs, entered upon the foreshore in Joss Bay and bathed therefrom in the sea.

The defendant claimed a right to bathe from the foreshore by dedication, by prescription, and by custom. The claim by prescription was abandoned at the trial before Buckley J., when it was discovered that Sir A. Harmsworth was a tenant of the manor. It is not thought necessary to state the facts relating to the claims by dedication and by custom, because Buckley J. held that those claims could not be maintained, and they were both abandoned on the hearing of the appeal.

The defendant also in his defence made the following claim to a common law right: "In the alternative the defendant says that all the liege subjects of His Majesty the King of right have at all times had and enjoyed and still of right ought to have and enjoy, the right and liberty of bathing in the sea from time to time being over and upon the whole or any part of or adjoining to the foreshore in Joss Bay at all seasonable and convenient times for their health and recreation, and for that purpose of going and returning, passing and repassing, into, through, over, and along the said foreshore on foot, and with their servants, and of staying in and upon the said foreshore a necessary and convenient time for the purpose of bathing as aforesaid."

The action came on for hearing before Buckley J. on January 14, 1904.

Astbury, K.C., and *L. Mossop*, for the plaintiffs. The evidence proves, it is submitted, that the foreshore forms part of the manor, and the onus is on the defendant to shew that the public have any such right over it as is claimed.

Buckmaster, K.C., and *Sheldon*, for the defendant. It is contended that all the King's subjects have a right at common law to use the foreshore for the purpose of bathing. *Blundell* v. *Catterall* (1) is distinguishable.

Astbury, K.C., and *L. Mossop*, for the plaintiffs, relied on the decision in *Blundell* v. *Catterall* (1) as shewing that there was no public right of bathing from the foreshore.

Cur. adv. vult.

Jan. 23. BUCKLEY J., after stating the facts, continued:—The question I have to try is simply whether the defendant and his boys are as of right entitled to go on the foreshore at Joss Bay, which is the private property of the plaintiffs, and bathe in the sea. The defendant contends that that which he is doing is justified by a common law right, which he says exists, to do the acts complained of. The proposition is put in two ways: First, that there is a common law right to go upon the foreshore, to pass and repass there at will, and, further, being there, to bathe in the sea; and, secondly, supposing there is not this common law right to go upon the foreshore and pass and repass thereon at will, that if the defendant shews, as he says he does, that he has in some way a right of access, then, being there in exercise of such right of access, he and his boys are entitled to bathe. I will deal with these two points in order.

As to the first, no facts are wanted beyond that which I have stated—that this foreshore is the private property of the plaintiffs. The defendant contends that he has a common law right to go upon this land, being private property of the plaintiffs, and to bathe therefrom, because it is the foreshore. I propose to state what I understand to be the law as to the right of a member of the public to go on the foreshore of a private owner. By the common law all the King's subjects have in general a right of passage over the sea with vessels for the purposes of navigation and have, primâ facie, a common of fishery there, and they have the same rights over that portion

(1) 5 B. & Al. 268; 24 R. R. 353.

C. A. 1904 BRINCKMAN v. MATLEY. Buckley J.

of the sea which lies over the foreshore at the times when the foreshore is covered with water. But when the sea recedes and the foreshore becomes dry there is not, as I understand the law, any general common law right in the public to pass over the foreshore. There are certain limited rights, and the fact that such limited rights exist goes to shew that there cannot be a general right. For purposes of navigation there exists a common law right to cross the foreshore in case of peril or necessity. For the purpose of exercising the right of fishing it may be that there is—I do not say that there is—a right to cross the foreshore in order to launch a boat. In Brooke's Abridgment, tit. Customs, pl. 46, all the judges agreed "that fishermen may justify going on the land adjoining the sea to fish in the sea, for this is for the good of the Commonwealth, affording sustenance to many persons, and is the common law." The right of navigation, it has been said, is for the general benefit of all the kingdom, and the right of fishing tends to the sustenance and beneficial enjoyment of individuals, and for these purposes it would seem that there are special rights to cross the foreshore. But it does not follow, and I think is not the law, that the public have the right to go upon or to cross the foreshore for all purposes. If there be such a general right by common law it must exist on every part of the foreshore; and the result would be that the erection of buildings, wharves, and quays so as to reach the water, the reclamation of additional land from the sea and its conversion to pasturage and tillage, the erection of stakes for nets upon the foreshore, and the digging of sand or stones which might leave dangerous openings in the foreshore, would all be indictable as being interferences with a right of highway over the foreshore. I have endeavoured thus to summarize the reasoning upon which, as it seems to me, in *Blundell* v. *Catterall* (1), it was, after citation of numerous passages from Lord Hale, De Jure Maris, decided that there is no common law right of going upon the foreshore with a view to bathing therefrom and exercising any supposed common law right of bathing. Holroyd J. put the greater part of the matter in a small compass thus (2): "The public common law rights, too,

(1) 5 B. & Al. 268; 24 R. R. 353. (2) 5 B. & Al. 301.

with respect to the sea, independently of usage, are rights upon the water, not upon the land, of passage and fishing on the sea, and on the seashore, when covered with water; and though, as incident thereto, the public must have the means of getting to and upon the water for those purposes, yet it will appear that it is by and from such places only as necessity or usage have appropriated to those purposes, and not a general right of lading, unlading, landing, or embarking where they please upon the seashore, or the land adjoining thereto, except in case of peril or necessity." In *Blundell* v. *Catterall* (1) there was found to be a public right of way along the shore; but, looking at the judgment of Holroyd J. (2), the existence of that highway in no way affected the decision. The point was that the acts committed were committed for other purposes than the use of a general public highway, and out of the highway, by the latter of which I understand that the public left so much of the foreshore as was a highway and crossed over the part which was not a highway down to the sea and there bathed. *Blundell* v. *Catterall* (1) has been followed in *Mace* v. *Philcox* (3) and *Llandudno Urban Council* v. *Woods*. (4) It is binding upon me. The defendant's counsel sought to distinguish *Blundell* v. *Catterall* (1) from the present case by pointing out that the owner of the foreshore there had an exclusive right of fishing; but I cannot see that that fact formed any essential basis of the judgment. The judgment seems to me to have been rested upon the general principles which I have endeavoured to state.

His Lordship then dealt with the other defences, which he held could not be maintained, but it is considered unnecessary to report his judgment on those points.

His Lordship made the declaration, and granted the injunction, claimed by the plaintiffs.

F. E.

C. A. The defendant appealed. The appeal came on for hearing on July 13, 1904.

(1) 5 B. & Al. 268; 24 R. R. 353.
(2) 5 B. & Al. 289.
(3) (1864) 15 C. B. (N.S.) 600.
(4) [1899] 2 Ch. 705.

C. A. 1904 BRINCKMAN v. MATLEY.

Buckmaster, *K.C.*, and *Sheldon*, for the defendant. It is submitted that there is a common law right for all the King's subjects to use the foreshore for the purpose of bathing in the sea. The foreshore was originally the property of the Crown, but the King held it subject to certain rights of user by the public, one of those rights being user for the purpose of bathing, and a grantee of part of the foreshore from the King holds it subject to the same public rights. This right exists wherever access to the foreshore can be lawfully obtained, but it cannot be exercised so as to prevent the erection of quays or piers. It is admitted that the public have rights of fishing and navigation over the foreshore. If you can get access to the foreshore you are entitled to make a lawful use of it, and bathing is one lawful use. It may even be said that there is a common law right to pass and repass along the foreshore. In Bracton, De Legibus Angliæ, Lib. I., De Rerum Divisione, cap. 12, fo. 7, it is said: "Naturali vero jure communia sunt omnia hæc, aqua profluens, aer et mare, et littora maris, quasi maris accessoria. Nemo enim ad littus maris accedere prohibetur, dum tamen a villis et ædificiis abstineat, quia littora sunt de jure gentium communia, sicut et mare."

Again Callis on Sewers (originally published in 1622), 4th ed., speaking of the shore, says, p. 67: "Rex in eâ habet proprietatem, sed populus habet usum ibidem necessarium: so that as to the lading and unlading of ships, and for drying of nets there, and for other necessary businesses, the subjects have these uses therein, but the soil and grounds thereof belong properly domino Regi. And a subject may have the same by prescription." It is submitted that a "necessary use" is the proper use for purposes for which the foreshore can be used, and that bathing is one. In *Bagott* v. *Orr* (1) it was held that primâ facie every subject has a right to take fish found upon the seashore between high and low water-mark. That involves a right in the public to walk on the foreshore between high and low water-mark when the sea is out. For the purpose of shrimping there is a right to pass along the shore as you please, and when you are there why should it be wrong to bathe?

(1) (1801) 2 Bos. & P. 472; 5 R. R. 668.

In Stuart Moore on the Foreshore, at p. 723, it is said, "the mere ownership of the shore, whether possessed by the King, or by a lord of a manor, will not entitle the owner to establish a separate fishery, and exclude the public." In *Rex* v. *Crunden* (1) a man was indicted for bathing in the sea near to inhabited houses, but this was on the ground of indecency. It is stated in the report that "a very few years ago there were no houses near this spot, and whole regiments of soldiers used to bathe there at the same time"; and the defendant's counsel said: "It appeared that the practice of bathing at this place had continued for many years." Macdonald C.B. said: "Nor is it any justification that bathing at this spot might a few years ago be innocent." The Court was evidently acting on the assumption that there was a right to bathe at the place if it was done decently.

Buckley J. founded his judgment upon the decision of the majority of the Court of King's Bench in *Blundell* v. *Catterall* (2), which is the only decision directly in point. No doubt the majority of the Court did there lay it down that "the public have no common law right of bathing in the sea, and, as incident thereto, of crossing the seashore on foot, or with bathing machines, for that purpose." But in so deciding they went further than was necessary for the decision of the question actually before them, which was, as stated by Holroyd J. (3), "whether there is a common law right in all the King's subjects to do so (i.e., bathe) in the locus in quo, though the soil of the seashore, and an exclusive right of fishing there in a particular manner (namely, with stake nets), are private property belonging to a subject, and though the same have been a special peculiar property from time immemorial." It is submitted that the judgments so far as they go beyond the point actually raised there are only dicta. At any rate the decision is not binding on this Court. And, moreover, Best J. dissented from the majority. He said (4): "The shore of the sea is admitted to have been at one time the property of the

(1) (1809) 2 Camp. 89, 90; 11 R. R. 671.

(2) 5 B. & Al. 268; 24 R. R. 353.

(3) 5 B. & Al. 288.

(4) 5 B. & Al. 287.

C. A. 1904 BRINCKMAN v. MATLEY.

King. From the general nature of this property, it could never be used for exclusive occupation. It was holden by the King, like the sea and the highways, for all his subjects. The soil could only be transferred, subject to this public trust; and general usage shews that the public right has been excepted out of the grant of the soil . . . . Unless I felt myself bound by an authority as strong and clear as an Act of Parliament, I would hold on principles of public policy, I might say public necessity, that the interruption of free access to the sea is a public nuisance." *Blundell* v. *Catterall* (1) depended on its particular facts; the existence of the public right of bathing would have been inconsistent with the exclusive right of fishing which the lord of the manor had.

The decision in *Blundell* v. *Catterall* (1) has been disapproved by text-writers, e.g., Hall on the Seashore, 2nd ed. pp. 156 et seq. The same view is taken in Phear's Rights of Water, pp. 44 et seq.; Stuart Moore on the Foreshore, pp. 833 et seq.

The only case in which *Blundell* v. *Catterall* (1) has been strictly followed is *Llandudno Urban Council* v. *Woods* (2), in which, though Cozens-Hardy J. made a declaration that the defendant was not entitled without the consent of the plaintiffs (they being lessees from the Crown of the foreshore) to hold religious services on the foreshore, yet he declined to grant an injunction to restrain the defendant from so doing. The learned judge held that he was bound by *Blundell* v. *Catterall*. (1)

[*Astbury, K.C.*, for the plaintiffs, referred to *Tyson* v. *Smith*. (3)]

In *Dickens* v. *Shaw* (4) Bayley J., one of the judges who decided *Blundell* v. *Catterall* (1), said (5): "The right of the Crown is not, in general, for any beneficial interest to the Crown itself, but for securing to the public certain privileges in the spot between high and low water-mark . . . . There are many

(1) 5 B. & Al. 268; 24 R. R. 353.
(2) [1899] 2 Ch. 705.
(3) (1838) 9 A. & E. 406; 48 R. R. 539.
(4) (1822) Reported in Hall on the Seashore, 2nd ed. App. p. xlv.
(5) At p. lxiv.

rights to be exercised on the spot between high and low water-mark,—amongst others, that of getting sand is one, and sometimes also the power of getting stones is another." In *Attorney-General* v. *Tomline* (1) the passages which have been cited from Bracton and Callis were referred to by Fry J. as recognised authorities. In *Mace* v. *Philcox* (2) it was held that bathing machines could not be placed on part of the foreshore which was private property, but the Court expressly refrained from expressing any opinion as to the right of the public to use the foreshore for the purpose of bathing. In *Lord Advocate* v. *Young* (3) Lord Watson said: "possession of the foreshore, in its natural state, can never be, in the strict sense of the term, exclusive. The proprietor cannot exclude the public from it at any time." That could not be predicated of any other kind of property.

[COZENS-HARDY L.J. Is there any presumption that the law of Scotland as to the foreshore is the same as that of England? That was a Scotch case.]

The case was not decided or argued on the ground of a difference between the laws of the two countries. The "necessary use" of the public is not the same thing as a use of necessity. The public right, it is submitted, is not a mere use of necessity, such as the right of shipwrecked mariners to land on the foreshore. The public right of user of the foreshore extends to everything except the taking of profit out of it. That was what the defendant in *Blundell* v. *Catterall* (4) sought to do.

[They also referred to *Attorney-General* v. *Chambers*. (5)]

Astbury, *K.C.*, and *L. Mossop*, for the plaintiffs, were not called upon.

VAUGHAN WILLIAMS L.J. This case raises a question which at one time in the history of the law of this country might have been a very difficult question, and it is certainly a very important question; but, according to my understanding, the law as laid down by the majority of the Court of King's Bench in

(1) (1879) 12 Ch. D. 214.
(2) 15 C. B. (N.S.) 600.
(3) (1887) 12 App. Cas. 544, 553.
(4) 5 B. & Al. 268; 24 R. R. 353.
(5) (1854) 4 D. M. & G. 206.

C. A. 1904 BRINCKMAN v. MATLEY. Vaughan Williams L.J.

Blundell v. *Catterall* (1) has been recognised ever since by the whole of the profession as an accurate and binding statement of the law. If that is so, I do not think that we ought now, after the lapse of eighty years, to upset the law thus settled. It may, I know, be properly said, as indeed it was said by Mr. Buckmaster, that the exact question which the Court of King's Bench had to decide in *Blundell* v. *Catterall* (1) is not that which we have to decide to-day. The question which had to be decided there was thus stated by Holroyd J. (2): "The question put in this case for our opinion, is the general question, whether there is a common law right for all the King's subjects to bathe in the sea, and to pass over the seashore for that purpose, on foot and with horses and carriages. But, coupled with the facts stated in the case, the question really is, whether there is a common law right in all the King's subjects to do so in the locus in quo, though the soil of the seashore, and an exclusive right of fishing there in a particular manner (namely, with stake nets), are private property belonging to a subject, and though the same have been a special peculiar property from time immemorial." And when at the conclusion of his judgment Abbott C.J. (3) stated shortly what the decision of the Court was, he said: "But where one man endeavours to make his own special profit by conveying persons over the soil of another, and claims a public right to do so, as in the present case, it does not seem to me that he has any just reason to complain, if the owner of the soil shall insist upon participating in the profit, and endeavour to maintain his own private right, and preserve the evidence thereof. For these reasons, I am of opinion that there is not any such common law right as the defendant has claimed." I have read these passages in order to shew that I recognise and bear in mind that the question which had to be decided in *Blundell* v. *Catterall* (1) was, strictly speaking, not the same question as that which we have to decide to-day. But when the majority of the Court came to discuss the narrower question which they had to decide in *Blundell* v. *Catterall* (1), each of them did discuss and determine the wider

(1) 5 B. & Al. 268; 24 R. R. 353. (2) 5 B. & Al. 288.
(3) 5 B. & Al. 316.

right which is claimed by the present defendant. They did discuss the question whether there is a common law right to go upon a part of the foreshore which has become private property for the purpose of bathing, and they also discussed the question whether there existed any such right at a time when the foreshore was still the property of the Crown. In my judgment we should be doing very wrong if we were now to reopen those questions which were determined once and for ever in the judgments of the majority of the Court in that case. Having said that, I feel that it would be a presumption on my part if I were to attempt to state again the grounds which justify those judgments, and in particular the judgment of Holroyd J., which has come to be regarded as one of the finest examples we have of the way in which the judgment of an English judge ought to be expressed, and the reasons for it given.

I will, however, say a word or two about some of the grounds which were urged by Mr. Buckmaster when he was attacking that judgment, and when he was asked how he would state his own case apart from the decision in *Blundell* v. *Catterall*. (1) Now, as I understand him, he put his case in this way. No one, he said, can possibly deny the right to swim in the sea; the only thing which could be in question was the right of access to the sea from the land in order to enable one to get into the sea and swim—a right of access to the sea across the foreshore in the sense in which the foreshore is the property of the Crown, i.e., the foreshore between the medium high and low water-marks. It was at first said that there is a right of access to every part of the foreshore, and that that right is really essential to the exercise of rights which admittedly the public have over the sea, such as the right of navigation and the right of fishing. It was suggested to Mr. Buckmaster that possibly those rights when exercised must be exercised by obtaining access to the sea by means of public highways which, when they reach the foreshore, would be treated as prolonged when the water is out over the foreshore in a direct line to the sea. Apparently Mr. Buckmaster rejected that limit of the right of the public, on the ground that when you have to exercise

(1) 5 B. & Al. 268; 24 R. R. 353.

C. A. 1904 BRINCKMAN v. MATLEY. Vaughan Williams L.J.

one of those rights, e.g., the right of fishing, you would want to pass along the shore right and left in order to exercise the right of fishing. In fact, in order to maintain his position, Mr. Buckmaster was driven to say that there is a public highway along the whole of the foreshore, the frontage of the sea, in so far as it falls within the foreshore. All I can say is that no authority was adduced to support that proposition. Under these circumstances, as it does not appear to me that the right contended for has been shewn to be essential to the exercise of any admitted public right over the sea, and no authority which affirms such a right has been cited, I do not think we ought now to affirm this right, the affirmance of which would, in my opinion, be entirely inconsistent with the judgments of the majority of the learned judges in *Blundell* v. *Catterall*. (1) Text-books, written, no doubt, by authors of great learning and authority, have been cited, and much reliance was placed on *Dickens* v. *Shaw* (2), which is said to shew that the right of the Crown is not in general a beneficial interest in the Crown itself, but is a right held for the purpose of securing to the public certain privileges in the space between high and low water-mark. If all that is meant is the proposition which was affirmed by Bayley J. in his judgment in *Blundell* v. *Catterall* (1) I have not a word to say against it; but I do not see how it helps Mr. Buckmaster. Bayley J. said (3): "Many of the King's rights are, to a certain extent, for the benefit of his subjects, and that is the case as to the sea, in which all his subjects have the right of navigation, and of fishing, and it is so in highways, along which all his subjects have the right of passage, and the King can make no modern grants in derogation of those rights"; and it is not likely that that learned judge meant to say anything different in *Dickens* v. *Shaw*. (2) But that passage in no way supports Mr. Buckmaster's proposition that it is impossible for the Crown to have any beneficial interest in the foreshore. We know perfectly well that the Crown has large beneficial rights in the foreshore, rights which are now, I think, enjoyed by the public

(1) 5 B. & Al. 268; 24 R. R. 353.
(2) Reported in Hall on the Seashore, 2nd ed. App. p. xlv.
(3) 5 B. & Al. 304.

exchequer, but they are none the less the rights of the Crown, and, as was pointed out during the argument by my brother Cozens-Hardy, in the case of a railway being carried along the foreshore the railway company have to pay the Crown for the foreshore; and there are various rights on the foreshore—pecuniary beneficial rights—which the Crown has habitually exercised. Under these circumstances it is sufficient to say that the Crown holds the foreshore upon the terms that it must recognise the jus publicum, whatever it may be, over the foreshore, and do nothing inconsistent with that jus. This jus, as regards the rights of navigation and of fishing—the right to use the foreshore for those purposes—has a great deal of authority to support it, but except as regards those rights, and in so far as any act of the Crown would defeat those rights, the Crown has the beneficial ownership of the foreshore, and a private person, such as the present plaintiffs, would stand in the same position. This being so, it seems to me that we must affirm the judgment of Buckley J., because we are bound to follow *Blundell* v. *Catterall* (1), which to my mind is conclusive of the present case.

ROMER L.J. I hope I may be excused for saying that I have listened most sympathetically to the arguments addressed to us by the appellant's counsel; but still my duty as a judge is to say that I cannot accede to those arguments. No doubt as regards the foreshore of this country there are certain well-established rights of the public in relation to navigation and fishing. The extent of those rights I need not now consider, for the right claimed by the defendant is in nowise connected with rights of navigation or fishery. No doubt also the public have certain rights of necessity over the foreshore. But I am compelled to say that in the eyes of the law bathing cannot for this purpose be regarded as a matter of necessity. I suppose that, legally speaking, a claim as of right to bathe in the sea would be regarded as a claim for a species of recreation. This being so, on what ground does the appellant base his claim? The claim is put in one of two ways. First, it is said that there

(1) 5 B. & Al. 268; 24 R. R. 353.

C. A. 1904 BRINCKMAN v. MATLEY. Romer L.J.

is a general common law right on the part of the public to pass and repass for all lawful purposes along every part of the foreshore—in other words, that the foreshore is to be regarded as a species of public highway. In the alternative it is said, if that is not so, at any rate the public have a limited or special right to use the foreshore for the purpose of bathing. If those questions had not been judicially considered and decided more than eighty years ago I think they would have received the most careful consideration, and might have been treated as giving rise to some difficulty. But both those points had to be considered, and were most carefully and fully dealt with, by the Court of King's Bench in *Blundell* v. *Catterall*. (1) No one can read the judgments in that case without seeing how fully every point bearing upon the questions involved was dealt with, and how carefully the judgments were expressed. In particular, I think the judgment of Holroyd J. has been always considered as one of the most remarkable judgments delivered by that learned judge in the course of his career on the bench. The points then in question received the most minute and careful consideration, and the judgments of the majority of the judges have remained unchallenged by judicial authority from that time to the present. Those judgments have received frequent recognition, but they have never been dissented from. Throughout the long period which has elapsed no single case can be discovered in which the judgments of the majority on the points which I have been considering have been judicially impugned or reflected upon. Under these circumstances I agree with Vaughan Williams L.J. that it is now too late to ask us to treat this question as open. I think we are bound by the decision in *Blundell* v. *Catterall* (1), unless indeed we were persuaded that those judgments were obviously wrong. Speaking for myself, that is far from being the case; indeed I think the judgment of Holroyd J. a very convincing judgment. At any rate, at this period of time I am not prepared to differ from the judgments of the majority, and I think this Court ought to follow them. I agree, therefore, that this appeal must fail.

(1) 5 B. & Al. 268; 24 R. R. 353.

COZENS-HARDY L.J. I also agree; but, having regard to the admirable arguments which have been addressed to us on behalf of the appellant, I desire to add a few words. If we had been in the year 1804 instead of 1904, the question raised would, undoubtedly, have required much consideration and elaborate research; but the great case of *Blundell* v. *Catterall* (1), decided in the Court of King's Bench in 1821, has relieved us from this task. No earlier authority has been cited to us which was not discussed in that case. The whole law relating to the foreshore was there investigated, and with an amount of learning which it is impossible not to envy. I take that decision to amount to a positive assertion that no such right as that which is now claimed exists at common law. That case, or rather the principles there laid down, have never since been questioned by any authority to which our attention has been called. Under these circumstances, though I do not say that the point may not be open to the House of Lords to reconsider, I think we ought not in this Court even to attempt to discuss it.

One word about *Bagott* v. *Orr* (2), which was much relied on for the appellant. Whether *Bagott* v. *Orr* (2) is or is not good law, it is not necessary for us now to decide—certainly I do not desire to attack it; but it only proceeds on the footing that the common law right of fishing on the foreshore enjoyed by the public includes the right to get shellfish when the foreshore is dry; it in nowise supports the right of the public to go on the foreshore for the purpose of bathing, or for the purpose of recreation.

For these reasons I think the appeal should be dismissed with costs.

Solicitors: *Lewis & Lewis; Saltwell, Tryon & Saltwell.*

(1) 5 B. & Al. 268; 24 R. R. 353. (2) 2 Bos. & P. 472; 5 R. R. 668.

W. L. C.

C. A. 1904 June 6; July 18.

In re A. (A Person of Unsound Mind not so found by Inquisition).

Lunatic—Committee—Powers exercisable by Committee under Order of Judge—Power vested in Lunatic "in the Character of Trustee"—Power of Appointment among Children—Lunacy Act, 1890 (53 & 54 *Vict. c.* 5), *ss.* 116, 128.

Where a marriage settlement conferred on the husband and wife a joint power of appointment by deed among the children of the marriage, and the wife afterwards became a lunatic not so found:—

Held (Cozens-Hardy L.J. dissenting), that the Judge in Lunacy under s. 128 of the Lunacy Act, 1890, had jurisdiction to authorize the person appointed under s. 116 to exercise the powers of a committee of the estate to concur on behalf of the alleged lunatic in exercising the joint power of appointment as being a power vested in the alleged lunatic "in the character of trustee."

By a marriage settlement dated January 7, 1868, certain trust funds were settled, subject to the life interests of the husband and wife, in trust for all or such one or more exclusively of the others or other of the children of the marriage at such age or time or respective ages or times if more than one, in such shares and with such future and executory or other trusts for the benefit of the said children or some or one of them, and upon such conditions and with such restrictions and in such manner as the husband and wife should by any deed or deeds or writing or writings sealed and delivered with or without power of revocation and new appointment jointly appoint, and in default of such appointment and so far as any such appointment should not extend then as the survivor of them should in like manner or by will or codicil appoint, and in default of any such appointment and so far as any such appointment should not extend in trust for all the children or any the child of the intended marriage who being sons or a son should attain the age of twenty-one years, or being daughters or a daughter should attain that age or marry under that age, and if more than one in equal shares.

There were seven children of the marriage.

The wife was now a lunatic not so found by inquisition.

The husband had been appointed under s. 116 of the Lunacy Act to exercise the powers of a committee of the estate of the alleged lunatic.

This was a summons taken out by the husband in Lunacy asking that he might be at liberty on behalf of the alleged lunatic to exercise or concur in exercising the joint power of appointment contained in the marriage settlement by executing a deed-poll appointing two-sevenths of the trust funds to two of the children for life only, with remainder to the other children, with a power of revocation. The object of making an appointment in this form was that the two children in question had become incapable of managing their own affairs.

The summons was adjourned into Court in order that the question might be argued whether the Judge in Lunacy had any jurisdiction to make the order.

Farwell, for the summons. This is a power vested in the lunatic in the character of trustee "within the meaning of s. 128 of the Lunacy Act, 1890." (1) It is true that a donee of a power of appointment among children cannot be compelled to exercise it, yet if he does exercise it he must exercise it as a trustee. It is a power in the nature of a trust and must be exercised with a due regard for the benefit of the children: *Tempest* v. *Lord Camoys* (2); *Coffin* v. *Cooper*. (3) The donee stands in a fiduciary position towards the children. It is on this ground that the Court sets aside illusory appointments: *Butcher* v. *Butcher* (4); or appointments made in fraud of the power: *Topham* v. *Duke of Portland*. (5) That case shews that there may be a fraud on the power without the existence

(1) Sect. 128 of the Lunacy Act, 1890, provides as follows: "Where a power is vested in a lunatic in the character of trustee or guardian, or the consent of a lunatic to the exercise of a power is necessary in the like character, or as a check upon the undue exercise of the power, and it appears to the judge to be expedient that the power should be exercised or the consent given, the committee of the estate, in the name and on behalf of the lunatic, under an order of the judge, made upon the application of any person interested, may exercise the power or give the consent in such manner as the order directs."

(2) (1882) 21 Ch. D. 571.

(3) (1865) 2 Dr. & Sm. 365, 373.

(4) (1812) 1 V. & B. 79; 12 R. R. 193.

(5) (1869) L. R. 5 Ch. 40.

C. A. 1904 A. (A PERSON OF UNSOUND MIND NOT SO FOUND BY INQUISITION), *In re.*

of any moral fraud. In *In re Shortridge* (1) Lord Halsbury treats the power of appointing new trustees as a power vested in the donee in the character of trustee, and it was held that the Judge in Lunacy had jurisdiction to authorize the committee to exercise the power. In *In re Nevill* (2) a similar decision was come to under the corresponding section of the Act of 1853, where the consent of the lunatic was required to a power of advancement.

[Reference was also made to *In re Garrod* (3) and *In re Skeats' Settlement.* (4)]

Cur. adv. vult.

July 18. VAUGHAN WILLIAMS L.J. In this case the question is whether the 128th section of the Lunacy Act, 1890, gives to a judge exercising jurisdiction in Lunacy jurisdiction to make an order for the exercise by the committee of the estate of a lunatic not so found, in the name and on behalf of the lunatic, of a limited power of joint appointment vested by a marriage settlement in the lunatic (the wife) and the applicant (the husband).

[His Lordship read the clause in the marriage settlement and s. 128 of the Lunacy Act, 1890.]

Now, is this power of appointment by the husband and wife jointly during their joint lives with or without power of revocation and new appointment a power which is vested in the lunatic in the character of trustee or guardian?

In the case of *Coffin* v. *Cooper* (5) Kindersley V.-C., dealing with the exercise by a married woman of a power of appointment by will over a fund to be divided among her children, where the power had been exercised by the married woman in pursuance of covenants by deeds with one of her sons and third parties that she would appoint in favour of such son not less than a certain sum out of the fund, and by the same deeds the son mortgaged to such third parties all his interest in the fund whether by appointment or in default of appointment, held

(1) [1895] 1 Ch. 278, 283.
(2) (1885) 31 Ch. D. 161.
(3) (1885) 31 Ch. D. 164.
(4) (1889) 42 Ch. D. 522.
(5) 2 Dr. & Sm. 365, 373.

that the appointment was good, notwithstanding the covenants in the deeds, and in the course of his judgment used these words: "In the absence of authority, I should have decided this case with reference to certain broad principles, the soundness of which cannot (I think) be disputed. One is, that a power to appoint among children is a power in the nature of a trust, created and intended to be exercised with a view to the benefit of the objects of the power, as a class, and as individuals."

In the case of *In re Nevill* (1), which was a case in which trustees had a power of advancement with the consent of the husband and wife and the husband was found lunatic, the Court, purporting to act under s. 137 of the Act of 1853, the section corresponding with s. 128 of the Act of 1890, held that there was jurisdiction to authorize the committee to consent. This of course is a case, not of the exercise of a power, but of consent to the exercise of it; but there is no reason why the exercise of the power and the consent should be dealt with differently.

In the case of *In re Harwood* (2) the Court doubted how far a power of sale fell within s. 136 of the Act of 1853, the section dealing with powers vested in a lunatic for his own benefit.

The next case is *In re Skeats' Settlement* (3), a case dealing with a power of appointment of new trustees. Kay J. dealing with that power says: "I come to the conclusion that the power is a power of a fiduciary character, and consequently that the man who exercises it is exercising a duty of a fiduciary nature to the cestuis que trust."

In *In re Little* (4) Kay J., dealing with an appointment by a married woman under a limited power in favour of children, after pointing out that there is no doubt that there may be a case in which, where there has been a bonâ fide release not made for any corrupt purpose of the appointor, the release is good, goes on to say: "The power to distribute the fund among the children of the tenant for life is a power which contemplates that the circumstances of the family may so alter, that it may be of the highest possible importance to give a larger share to

(1) 31 Ch. D. 161.
(2) (1887) 35 Ch. D. 470.
(3) 42 Ch. D. 522, 527.
(4) (1889) 40 Ch. D. 418, 422.

C. A. 1904

A. (A PERSON OF UNSOUND MIND NOT SO FOUND BY INQUISITION), *In re.*

Vaughan Williams L.J.

one child than to another. This is a power essentially, in that respect, in the nature of a trust."

In *In re Baggs* (1) the Court of Appeal held that the power of sale vested in the lunatic under the Settled Land Act, 1882, was not exercisable by the committee under the jurisdiction conferred by s. 128 of the Act of 1890.

Having regard to these authorities, I have on the whole come to the conclusion that s. 128 of the Act of 1890 does give jurisdiction to the judge to direct the committee to exercise the power of appointment on behalf and in the name of the lunatic. I have come to this conclusion with more hesitation because I regret to say that Cozens-Hardy L.J. does not concur in it.

The section is not very clear, but as the words "in the character of trustee" are wide enough, if liberally construed, to cover this power of appointment, in respect of which the appointor undoubtedly owes a fiduciary duty to the children, although, as pointed out by Kay J., and indeed by Kindersley V.-C., the appointor may release the power and do other things which a trustee in the strict sense of the word could not do. It seems to me, therefore, one should examine the section and the nature of the power, and consider whether the Legislature could have intended that such a power should be exercised by the committee.

Now it is true that the power is such that the parties to the settlement must have contemplated the personal qualifications of the mother conjointly with the father to exercise such a power, and it might therefore be said that such a power was not proper to be exercised by the committee or a trustee, who would have presumably no such personal qualification; but I think that the answer to this is that this must often be equally true of a trustee strictly so called, for many a trustee is chosen either for his personal qualifications or for the relation in which he stands to the cestuis que trust; and notwithstanding this objection it is plain that s. 128 would give jurisdiction to the Court to direct the committee to exercise all the powers and discretion of the named trustee.

It follows, therefore, that this case must go back to the master

(1) [1894] 2 Ch. 416, n.

to consider whether this is a case in which the order ought to be made.

Romer L.J. The question which we have to decide here—whether the limited power of the kind which arises in this case falls within s. 128 of the Lunacy Act, 1890—is to my mind one of considerable difficulty. I have had the opportunity of reading the written judgment which Cozens-Hardy L.J. is about to deliver, and I fully feel the force of the reasoning of that judgment. At the same time, I have come to the conclusion on the authorities as they stand that such a power does fall within the section. Sect. 128 has always received a very wide interpretation, and in particular it is clear now that the words "vested in a lunatic in the character of trustee" are not limited to cases in which the lunatic is in fact a trustee. The words "in the character of" are very general and seem to me to be synonymous with such words as "in the nature of," and to cover cases in which the lunatic is not a trustee but holds the power in a fiduciary capacity. I do not propose to go through the authorities, which are fully dealt with by my Lord and Cozens-Hardy L.J., but I may call attention to the case of *In re Shortridge* (1), in which the Lord Chancellor said that the objection that the power of appointing new trustees was not a power "vested in a lunatic in the character of trustee or guardian" was a hypercritical objection. The only remark which I need notice pointing in an opposite direction to that indicated by me is that of Rigby L.J. in *In re Salt* (2), where, speaking with reference to a power of leasing vested in a tenant for life under the Settled Land Act, he said that that was not a power vested in the lunatic as a trustee or guardian. But that observation was not necessary for his decision in that case, and apparently he was not considering the precise point which we have here to determine. It is significant that he seems to have thought that the question was whether the lunatic was a trustee or guardian; but the actual words are, "in the character of trustee or guardian," which have been judicially interpreted as having

(1) [1895] 1 Ch. 278. (2) [1896] 1 Ch. 117.

C. A. 1904

A. (A PERSON OF UNSOUND MIND NOT SO FOUND BY INQUISITION), *In re.*

Romer L.J.

a much wider effect. In fact, I cannot help thinking that s. 128 of the Lunacy Act, 1890, is correlative with s. 120, sub-s. (*l*), of the same Act, which gives power to the Judge in Lunacy to "exercise any power or give any consent required for the exercise of any power where the power is vested in the lunatic for his own benefit or the power of consent is in the nature of a beneficial interest in the lunatic." Coupling those words with the wording of s. 128, I think that the two sections taken together were intended to cover all cases in which powers or powers of consenting were vested in the lunatic. It seems to me that the view taken by the Courts of the large effect of that part of s. 128 which deals with powers is borne out by the provision in the same section where the consent of the lunatic to the exercise of a power is necessary. The section authorizes the judge on behalf of the lunatic to give the consent where the consent of the lunatic to the exercise of the power is necessary "in the like character or as a check upon the undue exercise of the power." Those words are very large, and it seems strange that a distinction should be drawn between the right of a Judge in Lunacy to exercise the power and his right to give the consent to the exercise of the power. For example, suppose a limited power such as I am considering was given to the husband and wife jointly. It is said that the power would not be exercisable by the Court if the wife was a lunatic, whereas if the power was given to the husband to be exercised with the consent of the wife the Court would have jurisdiction to give the consent, seeing that the consent is a check on the power. To my mind it would be a strange and anomalous result to say that in the one case the Court would have jurisdiction and in the other case not. Further, I think that s. 129 shews what a large interpretation is placed upon s. 128 by the Act itself, for s. 129 purports to deal with the power of appointing new trustees, not as a separate kind of power, but as one clearly falling within s. 128, and, therefore, it contains merely supplementary provisions as to the consequences of the exercise of the power by the judge. It is said that the power of appointing new trustees is distinguishable from a limited power of appointment such as we are now considering, and no doubt

there is a distinction. It is said that the distinction is that in the case of a power to appoint new trustees, if none are appointed by the possessor of the power, the Court, apart from the provisions of the Lunacy Act, can exercise the power. That is not accurate. The Court cannot exercise the power. What it does is to appoint new trustees under its general jurisdiction. In my opinion, in considering the present question, no reliance can be placed upon any such distinction. For example, take the provision in s. 128 as to consenting to the exercise of a power. In an ordinary case, if the person to whom the right to consent is given refuses to give his consent, the Court cannot give the consent for him. But if the person to whom the right is given is a lunatic the Court can give the consent. Therefore the test is not whether in an ordinary case the Court can exercise the power or give the consent if the person in whom the power or the right of consent is vested refuses to act. That being the interpretation to be put on s. 128, I have only to consider whether a limited power such as that which we are now considering is one which can be exercised by the Court as being vested in a person in the character of trustee. As to that, in the case of a power of appointment among children—that is to say, a power to be exercised on behalf of the children—no doubt the donee of the power cannot be compelled to exercise it; but when he does exercise it he stands in a fiduciary position towards the children, and therefore it is that the Courts have refused to give effect to appointments when they were illusory or were made in fraud of the power. On the whole I have come to the conclusion that the limited power in this case does fall within s. 128, and that the Judge in Lunacy has jurisdiction to exercise it. This jurisdiction, however, can arise only under very special circumstances, and the cases in which the judge would be asked to exercise a power of this nature would be so few that that is sufficient to account for the fact of there being no precedent in the books for its exercise.

COZENS-HARDY L.J. This summons raises an important and difficult question, whether it is competent to the Court to authorize a committee to exercise a special power of appointment

C. A.
1904
A. (A Person of Unsound Mind not so found by Inquisition), *In re.*
Cozens-Hardy L.J.

in favour of children contained in the marriage settlement of the lunatic. The settlement is in common form—that is to say, subject to the life interests of the parents, the capital is held upon trust for such one or more of the children as the parents jointly by deed, or the survivor by deed or will, shall appoint, and in default for the children at twenty-one or marriage equally. The wife in the present case is a person of unsound mind not so found by inquisition, and the application is made under s. 116 of the Act of 1890.

Now it is clear that some statutory authority must be found to justify what is proposed. Two sections of the Lunacy Act, 1890, have been referred to—s. 120 (*l*) and s. 128. With respect to the former it is sufficient to say that this is not a power "vested in the lunatic for his own benefit," and the case cannot therefore be brought within that section. With reference to s. 128 there is more difficulty. That section is as follows: [His Lordship read the section, and continued:—]

It has been held under that section, and under the corresponding section (137) of the Act of 1853, that the Court can authorize the committee to exercise a power of appointing new trustees: *In re Bowmer* (1); *In re Shortridge.* (2) This conclusion was inevitable, for s. 129, which corresponds with s. 138 of the earlier Act, expressly asserts that the Act extends to such a power. It may not be strictly accurate to describe a power of appointing new trustees vested in a lunatic as "a power vested in the lunatic in the character of trustee," but it is nevertheless true that the appointment of a new trustee, if the donee of the power could not or would not act, could be enforced or secured by the beneficiaries in a proper case under the general or statutory jurisdiction of the Court of Chancery: *In re Sparrow.* (3) It is, therefore, no great stretch of language to hold that such a power is one which falls within the terms of s. 128.

There are many instances in which a power is vested in a lunatic in the character of trustee, e.g., the powers of advancement and maintenance contained in the present settlement

(1) (1859) 3 De G. & J. 658. (2) [1895] 1 Ch. 278.
(3) (1870) L. R. 5 Ch. 662.

are given to the trustees or trustee for the time being. It is sufficient to refer to *In re Boyce.* (1) Lord Westbury there says: "But assuming the trustee to take merely a power to sell the real estate, his position under the will is this:—he is appointed trustee: he is directed peremptorily to sell the testator's real estate on the widow's death: he is empowered to give effect to that sale by the execution of all necessary conveyances. In other words, three things are combined in his person under the language of the will; namely, the office of trustee, a personal obligation, and a power of fulfilling and discharging that obligation. Where these three things concur the case in my judgment falls within the statute, and the Court has jurisdiction thereunder to appoint a new trustee."

It is, however, difficult to maintain that a special power of appointment, the exercise of which will defeat a child's vested interest, can be considered as a power vested in a parent "in the character of trustee." There is no obligation upon a parent to appoint. Such a power may be released. The Court of Chancery could not under its general or statutory jurisdiction provide for the exercise of such a power. In *In re Baggs* (2) it was contended that by virtue of s. 116 and s. 128 the Judge in Lunacy could authorize the applicant to exercise the power of sale conferred upon the alleged lunatic as tenant for life under the Settled Land Act, as being a power vested in the alleged lunatic "in the character of trustee," and the language of s. 53 of the Settled Land Act was relied upon as shewing that in exercising such a power the tenant for life is deemed to be in the position of a trustee. But the Court of Appeal declined to accept this view. And in *In re Salt* (3) Rigby L.J., in referring to *In re Baggs* (2), says that the lunatic was clearly not a trustee within s. 128.

It is true that in *In re X.* (4), where a settlement contained a power enabling the alleged lunatic tenant for life to sell with the consent of the trustees and the master had found that a sale was desirable, the Court of Appeal held that it could authorize the exercise of the power of sale, but without saying

(1) (1864) 4 D. J. & S. 205, 209.
(2) [1894] 2 Ch. 416, n.
(3) [1896] 1 Ch. 117, 121.
(4) [1894] 2 Ch. 415.

C. A. 1904 A. (A PERSON OF UNSOUND MIND NOT SO FOUND BY INQUISITION), *In re.* Cozens-Hardy L.J.

whether it was under s. 120 as being a power for the benefit of the alleged lunatic, or under s. 128 or under both sections. These three cases are not perhaps easily reconciled, but they seem to me to establish the proposition that it is not enough to bring a case within s. 128 to make out that a power is fiduciary in its nature, or that if exercised it must be exercised fairly and honestly and without any personal beneficial interest. The present power is beyond doubt one of that nature: *Palmer* v. *Locke* (1) But I am not prepared to say that it is a power vested in the lunatic "in the character of trustee." I may add that the express mention in s. 120 (*h*) of a power of leasing vested in a lunatic having a limited estate supports the view that such a power would not fall within the general language of s. 128. Mr. Farwell in his able argument relied upon the decision of the Court of Appeal in *In re Nevill* (2), where it was held that the Court could authorize the committee to consent to the exercise of a power of advancement given to the trustees with the consent of the lunatic; but on consideration I do not think that authority helps him. That was a case falling under the second branch of s. 128, the consent of the lunatic to the exercise of the power being necessary "as a check on the undue exercise of the power." The words "in the character of trustee" do not apply to such a case.

In my opinion s. 120 (*l*) and s. 128 do not exhaust every kind of power. There are powers which are vested in the donee neither for his own benefit nor in the character of a trustee: a power of leasing vested in a limited owner (s. 120 (*h*)) is one instance of such a power. I think the present power falls within that class. It follows that in my opinion there is no jurisdiction to make the order asked for. I may add that there is no trace in the Lunacy Office of any such order having been ever made, although the jurisdiction has existed for half a century.

Solicitors: *Hunter & Haynes.*

(1) (1880) 15 Ch. D. 294, 303. (2) 31 Ch. D. 161.

H. B. H.

DICKINSON *v.* BARROW.

KEKEWICH J.

1904

June 29.

[1903 D. 2097.]

Vendor and Purchaser—Specific Performance—Statute of Frauds—Part Performance.

The defendant entered into a verbal contract with the plaintiffs for the purchase from them of a plot of land with a house upon it, which they were to build for her. During the progress of the building she frequently visited the site, and made suggestions for material alterations and improvements which were carried out by the plaintiffs at her request. In an action for specific performance of the contract she relied on the Statute of Frauds as a defence:—

Held, that the acts done by the plaintiffs at the request of the defendant were acts of part performance taking the case out of the Statute of Frauds, and that the plaintiffs were entitled to judgment for specific performance.

Dictum in *Caton* v. *Caton*, (1866) L. R. 1 Ch. 137, considered.

TRIAL of action with witnesses.

The plaintiffs, Albert and John Dickinson, builders, brought this action against the defendant, Mrs. Ada B. Barrow, for specific performance by her of a verbal agreement which, as they alleged, was entered into in July, 1903, between them and her for the sale to her of a plot of land at the corner of Central Avenue and Little Horton Lane, Horton, in the city of Bradford, together with a dwelling-house to be called "Parkfield," to be built thereon by the plaintiffs for the defendant, for the sum of 520*l.*, of which sum the defendant had paid to the plaintiffs 20*l.* as a deposit, and in part payment thereof.

The plaintiffs, who were developing a building estate, alleged that the house was to be built differently from the other houses on the estate, and according to a plan specially prepared on the defendant's instructions, and approved by her, and that they had duly erected the house in accordance with the agreement, except that the plaintiffs, at the defendant's requests, made orally from time to time by her, and also by her husband as her agent thereto authorized, made certain alterations and additions, especially with regard to the alteration of the kitchen floor level, the pulling down and setting back of a division wall, the making of a recess for a cupboard, the enlargement of two

KEKEWICH J. 1904 DICKINSON v. BARROW.

bedroom windows, and the insertion of a stone slab carved with the name "Parkfield" chosen by her. The plaintiffs also alleged that the house was erected under the daily inspection and supervision of the defendant up to the point of covering the roof.

The defendant admitted that there was a verbal agreement to purchase the proposed house and the land, and that she had paid 20*l.* as a deposit on the purchase, but she alleged that the house was to be built according to a plan previously prepared by the plaintiffs for their own purposes.

She denied that the house was to be built for her, or that the plan was prepared upon her instructions, or that the alterations or additions were made by the plaintiffs at the request either of herself or of her husband, and in the witness-box she stated that she had only visited the house "three or four times."

She relied on the Statute of Frauds as a defence to the action.

The further material facts of the case are stated in the judgment.

P. O. Lawrence, K.C., and *E. Clayton*, for the plaintiffs. The improvements and alterations made to the property by the plaintiffs at the request of the defendant, and the expenditure made by them are acts of part performance, taking the case out of the Statute of Frauds. There is no authority directly in point, but the case is well within the principle which is thus enunciated by Lord Cranworth in *Caton* v. *Caton* (1): "The ground on which the Court holds that part performance takes a contract out of the purview of the Statute of Frauds is, that when one of two contracting parties has been induced, or allowed by the other, to alter his position on the faith of the contract, as for instance by taking possession of land, and expending money in building or other like acts, there it would be a fraud in the other party to set up the legal invalidity of the contract on the faith of which he induced, or allowed, the person contracting with him to act, and expend his money";

(1) L. R. 1 Ch. 137, 148.

and after referring to the particular case before him his Lordship continued: "I presume it will not be argued that any consequences can be attached to acts of part performance by the party sought to be charged. If I agree with A., by parol, without writing, that I will build a house on my land, and then will sell it to him at a stipulated price, and in pursuance of that agreement I build a house, this may afford me ground for compelling A. to complete the purchase, but it certainly would afford no foundation for a claim by A. to compel me to sell on the ground that I had partly performed the contract."

[KEKEWICH J. referred to *McManus* v. *Cooke* (1), and in particular to the judgment of Kay J. in that case referring to *Wills* v. *Stradling* (2) and *Nunn* v. *Fabian.* (3)]

In *Mundy* v. *Jolliffe* (4) expenditure on the faith of an agreement to grant the plaintiff a lease was held to constitute part performance; and Lord Cottenham (5) said that "Courts of Equity exercise their jurisdiction, in decreeing specific performance of verbal agreements, where there has been part performance, for the purpose of preventing the great injustice which would arise from permitting a party to escape from the engagements he has entered into, upon the ground of the Statute of Frauds, after the other party to the contract has, upon the faith of such engagement, expended his money or otherwise acted in execution of the agreement."

Applying those principles, it is submitted that, in the circumstances of this case, it would be a fraud on the part of the defendant to resist specific performance of her parol contract.

[Reference was also made to *Pain* v. *Coombs* (6), and to Fry on Specific Performance, 4th ed. pp. 44, 222, 262, 265, 286.]

Stewart-Smith, K.C., and *F. Wright*, for the defendant. There has been no act of part performance on the part of the plaintiffs sufficient to take the case out of the operation of the Statute of Frauds. In *Frame* v. *Dawson* (7), Sir William Grant M.R. said: "This is not an unequivocal act; for it

(1) (1887) 35 Ch. D. 681, 693.
(2) (1797) 3 Ves. 378; 4 R. R. 26.
(3) (1865) L. R. 1 Ch. 35.
(4) (1839) 5 My. & Cr. 167; 48 R. R. 262.
(5) 5 My. & Cr. 177.
(6) (1857) 1 De G. & J. 34.
(7) (1807) 14 Ves. 386; 9 R. R. 304.

KEKEWICH J. 1904 DICKINSON v. BARROW.

would have taken place equally, if there had been no agreement. The principle of the cases is, that the act must be of such a nature, that, if stated, it would of itself infer the existence of some agreement; and then parol evidence is admitted to shew what the agreement is." There is no evidence of any act done which can be treated as referable to any agreement within Sir William Grant's statement of the law. The building by the plaintiffs on their own land is not the unequivocal act, referable only to previous contract, which the law requires, but is an equivocal act which might or might not be referred to the contract, and therefore the plaintiffs cannot be permitted to adduce parol evidence so as to take the case out of the statute: *Whittick* v. *Mozley*. (1) In *Maddison* v. *Alderson* (2) Lord Selborne referred with approval to *Frame* v. *Dawson*. (3)

KEKEWICH J. The facts of this case are really exceeding clear, and, excepting on one point, there is no conflict of evidence. The plaintiffs had acquired a building estate, which they laid out, and then erected houses which they realized, the process being by sale and not that of entering into building agreements. They erected houses which they were then prepared to sell. The defendant was minded to have a house erected for her and to buy it. She had a fancy for a corner house abutting on the Central Avenue, and she further desired that it should face and open on to that avenue, which was not what was originally proposed. She first saw the foreman, and then Mr. Dickinson himself. There was no objection to her views, and it only remained to settle the plans and fix the price. Both these things were done. The plans were criticized and altered and approved by the defendant and then submitted to the local authority, who passed them, and the price was fixed at 520*l*. So far and up to that time there was nothing but a parol agreement, and nothing by way of part performance so as to defeat the operation of the Statute of Frauds, if raised as a defence to an action for specific performance. The payment of the deposit and the alterations of the plans were all part of

(1) (1883) 1 Cab. & E. 86. (2) (1883) 8 App. Cas. 467, 479.
(3) 14 Ves. 386; 9 R. R. 304.

the parol agreement. The house, however, was erected, and it was erected according to a plan. There was no part performance there. It is quite true that the house was different from the other houses in many ways: it was larger, more expensive, and the rooms were disposed differently. Still, I do not see how up to that point any unequivocal act constituting part performance can be found. It is true that in *Caton* v. *Caton* (1) Lord Cranworth says: "If I agree with A., by parol, without writing, that I will build a house on my land, and then will sell it to him at a stipulated price, and in pursuance of that agreement I build a house, this may afford me ground for compelling A. to complete the purchase." But that is only a suggestion, not a decision; and if the case rested there I should not see my way to saying that there was part performance, even although that passage has been referred to without comment by Kay J. in *McManus* v. *Cooke* (2) as laying down the law.

But something more happened which is of essential importance in itself, and is important also as connected with what had passed before—in fact, it altered the character of what went before. The plaintiffs proceeded to build the house, and the defendant visited it, as also did her husband, and he evidently took a deep interest in it. I must treat her as the sole contracting party, and I think that his deep interest must be referred to the marital and not to any contractual relation; in other words, there is not enough here to shew that he was the defendant's agent. But here there comes in a conflict of evidence. The defendant lived about a quarter of an hour's walk away, and she says she only remembers going "three or four times" to see the house. But I think she went many times, and I shall take the liberty of construing that expression widely, as meaning an indefinite number of times. She lived in the neighbourhood, and in view of the natural feeling of curiosity existing in such a case, it is incredible to me that she did not go round a large number of times. And I have the evidence of the foreman of the works, of Mr. Dickinson, and of the plumber that she went there often: the first named says that she was there frequently, if not constantly; she took a considerable interest in the work. And what did she do?

(1) L. R. 1 Ch. 137. (2) 35 Ch. D. 681.

KEKEWICH J. 1904 DICKINSON v. BARROW.

Naturally enough she did what any one else would do who was having a house built in the neighbourhood. She saw that the plans were not being quite closely followed, or that some things were not quite convenient—for example, one bedroom which wanted opening into another, a cupboard which she wished to be put into a recess, a floor which was too low, so that the joists already fixed required to be raised, which was in fact done. She called attention to these things. She did not give orders as to them; the foreman was not her servant, nor could she order the plaintiffs to do them. She could only order them to do the work according to the plans which she had approved. But she was criticizing, not the plans, but the work as done. The point lies in the interest which she herself took on the spot in the building of this particular house. Her view of the case is that she merely made suggestions, and that these were complied with because they were improvements. If she had gone there and simply watched the house being built and then spoken as to certain things, there might be something to be said for her view. But when a lady goes again and again and insists on having alterations with a right, whether legal or moral does not matter, to be there, then it seems to me that I have an unequivocal act, and that she was not a mere trespasser, but was interested in the matter on the footing of a legal contract. The defendant relies on *Frame* v. *Dawson* (1); but there is nothing in that case which prevents me from thinking that no jury would fail to find that she was there in pursuance of some agreement entitling her to take the interest in the house which she did.

It seems to me, on the authority of the cases which have been cited, that the Court can here do justice, notwithstanding the Statute of Frauds, and that the defendant must not be permitted to escape from her agreement. There will therefore be the usual judgment for specific performance, if a good title is shewn.

Solicitors: *Jaques & Co., for Watson, Son & Smith, Bradford; Emmet & Co., for Rawnsley & Peacock, Bradford.*

(1) 14 Ves. 386; 9 R. R. 304.

C. C. M. D.

FARWELL J.
1904
June 23.

In re PIMM.
SHARPE *v.* HODGSON.

[1904 P. 700.]

Will—Construction—Specific Devise by way of Settlement—Estate Duty—Settlement Estate Duty—Direction to pay "my Duties" out of Residue.

A testator, who died in 1903, after making pecuniary bequests and devising certain freeholds upon trusts by way of settlement, devised and bequeathed the residue of his real and personal estate upon trust for sale and conversion, and directed his debts, funeral and testamentary expenses and duties to be paid out of the proceeds of such sale and conversion:—

Held, that the settlement estate duty as well as the estate duty payable in respect of the specifically devised realty must be paid out of the general residuary estate in exoneration of the specifically devised realty.

ADJOURNED SUMMONS.

James Pimm by his will dated May 28, 1900, after appointing his wife Martha Pimm, his sons Thomas and James Norris Pimm, and his friend Samuel Sharpe executors and trustees of his will, and after making certain specific and pecuniary bequests, devised to his said trustees certain freehold hereditaments upon usual trusts for his daughter for life with remainder to her children, with a gift over in default of children. The said testator then devised and bequeathed all the residue of his real and personal estate to his said trustees upon trust for sale and conversion, with a discretionary power to postpone the sale and conversion; and the said testator then directed that after payment out of the net proceeds of such sale and conversion "of my debts, funeral and testamentary expenses and duties, and the incumbrances which may be charged on my said estate or any part thereof," the clear residue should be held in trust for and be divided between certain persons, two of whom were his wife and his son James Norris Pimm. The testator died in June, 1903. His son Thomas renounced the office of executor and trustee of the will. The daughter had married a Mr. Hodgson and had issue.

This was an originating summons to determine the question whether the settlement estate duty and the estate duty payable

FARWELL J.
1904
PIMM, *In re.* SHARPE *v.* HODGSON.

in respect of the freeholds, specifically devised in trust for the daughter and her issue, were to be paid out of that property or out of the general residuary estate.

Stokes, for the trustees of the will.

H. Greenwood, for the specific devisees. The direction to pay "my duties" out of the residue is wide enough to include the settlement estate duty as well as the estate duty in respect of the specifically devised realty, and there is nothing in the will to cut down the generality of the words. The nearest case to the present is *In re Leveridge* (1), where Joyce J. held that a direction to pay estate duty out of residue included settlement estate duty.

Upjohn, K.C., and *Curtis Price*, for the residuary legatees. There is no authority directly in point. In *In re Lewis* (2) a direction in a will to pay "testamentary expenses, including all duties payable by law out of my estate," out of a special fund was held not to include settlement estate duty; and in *In re King* (3) Swinfen Eady J. lays down a rule as to the duties payable by executors. Here the testator does not direct that "all duties" are to be paid out of his residuary estate, but only "my duties," which should be limited to such duties as are properly payable by his executors out of residue, and do not necessarily include the estate duty and the settlement estate duty which by the provisions of the Finance Act, 1894, are a first charge on real estate specifically devised.

FARWELL J. The testator in this case by his will, after giving some pecuniary legacies, specifically devises certain freeholds. He then gives the residue of his real and personal estate upon trusts for sale and conversion, with a discretionary power to postpone the sale and conversion; and he then directs that after payment out of the net proceeds of such sale and conversion "of my debts, funeral and testamentary expenses and duties, and the incumbrances which may be charged on my said estate, or any part thereof and the incumbrances on No. 2,

(1) [1901] 2 Ch. 830. (2) [1900] 2 Ch. 176.
(3) [1904] 1 Ch. 363, 368.

St. James' Place," the clear residue is to be held upon certain trusts. It is sufficient to say that the dispositions of the specifically devised freeholds are such that settlement estate duty as well as estate duty is payable in respect of that property, and it is contended on behalf of the daughter that both those duties are payable out of the residuary estate. The question is, What duties are included in the direction to pay "my debts, funeral and testamentary expenses and duties" out of the proceeds of the residuary estate? The expression "my duties" is certainly a wide phrase, and I can see no ground for restricting its generality. I think it is a compendious way of expressing what he had in his mind, and that he meant to say, "all duties to which my estate is liable by reason of any of the dispositions I have made in my will." I can see no other sensible construction of this direction in the residuary clause of the will. The duties are payable to the revenue, but they arise under the provisions of the testator's will, and in this sense are the testator's duties. This being, in my opinion, the correct interpretation of the testator's language, I can see no ground for restricting the generality of the expression "my duties," and I think the decision of Joyce J. in *In re Leveridge* (1) has some bearing on the present case. *In re King* (2) is not in point: it merely decides that a direction to pay "testamentary expenses" is not an express direction to pay settlement estate duty so as to throw the burden of that duty on residue in exoneration of specifically bequeathed personalty, and I do not think that Swinfen Eady J. intended to lay down any general rule. The result is that in this case the settlement estate duty as well as the estate duty are payable out of the general residuary estate.

Solicitors: *Yarde & Co.; A. Sargeant.*

(1) [1901] 2 Ch. 830. (2) [1904] 1 Ch. 363.

H. L. F.

FARWELL J.
1904
June 30; *July* 1.

In re ROSE.
TRUSTEE OF THE PROPERTY OF E. T. ROSE *v.* ROSE.

[1904 R. 798.]

Settlement—Limited Power of Appointment—Ultimate Reversion in Donee of Power—Bankruptcy of Donee of Power—Incapacity of Trustee in Bankruptcy to release the Power—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 44—*Conveyancing Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 52—*Lunacy Act*, 1890 (53 & 54 *Vict. c.* 5), *s.* 120.

The capacity which the donee of a limited power of appointment has of releasing the power of appointment for his own benefit cannot, on his bankruptcy, be exercised by his trustee in bankruptcy for the benefit of his estate.

In re Hirst, [1892] W. N. 177, followed.

Adjourned Summons.

Sir J. Rose by his will dated March 21, 1887, after making certain specific and pecuniary bequests, devised all his real estate and the residue of his personal estate upon trusts for sale and conversion; and the testator directed that, after payment out of the proceeds of such sale and conversion of his debts, testamentary and funeral expenses and legacies, the trustees should stand possessed of a sum of 25,000*l.* upon trust to pay the income to his son E. T. Rose for life or until alienation or bankruptcy as therein mentioned, with a discretionary trust for the benefit of the son and his wife and children on the determination of his life interest on alienation or bankruptcy; and the testator directed that after the death of his said son the trustees should stand possessed of the said trust funds upon trust for the children and nephews and nieces of his said son in such manner as his said son should by deed or will appoint, and in default of such appointment in trust for all the children of his said son who should attain twenty-one or marry as therein mentioned, and in case no child or appointee should live to attain a vested interest, then in trust for his said son absolutely.

The testator died in August, 1888.

The son E. T. Rose had married in 1883, and there was no issue of his marriage.

In January, 1892, E. T. Rose was adjudicated a bankrupt, and the plaintiff was the trustee in his bankruptcy.

By a deed-poll dated May 2, 1902, the plaintiff, as the trustee in bankruptcy of E. T. Rose and in exercise of the power conferred upon him by the Bankruptcy Act, 1883, and of every other power him thereunto enabling, released the sum of 25,000*l.* bequeathed by the said will of the said testator for the benefit of the said E. T. Rose, his wife, issue, and appointees, and the investments representing the same, from the power or powers of appointment by the said will given to or vested in or exercisable by the said E. T. Rose, to the intent that the said power or powers might be absolutely extinguished, and that the trusts contained in the said will for the said E. T. Rose, his executors, administrators, and assigns, might become absolute, subject only to the trust contained in the said will for the benefit of the children (if any) of the said E. T. Rose in default of appointment.

In October, 1902, the plaintiff entered into a contract to sell the interest of the said E. T. Rose in the 25,000*l.* in reversion expectant on the death of the bankrupt contingently upon his having no children who should live to attain twenty-one or marry. The purchaser objected that the release of the power by the deed-poll of May 2 was inoperative. This was an originating summons by the trustee in bankruptcy for the determination of the question whether the deed-poll of May 2, 1902, operated wholly or to any and what extent to release the power of the said E. T. Rose under the said will to appoint the sum of 25,000*l.* or any part thereof in default of children attaining a vested interest in the sum.

Upjohn, K.C., and *E. Ford*, for the summons. Apart from bankruptcy, E. T. Rose could, if he chose, release this special power even although such release was for his own benefit: *In re Radcliffe* (1); *In re Somes* (2); and sub-s. 2 of s. 44 of the Bankruptcy Act, 1883, vests in the trustee in bankruptcy all

(1) [1892] 1 Ch. 227. (2) [1896] 1 Ch. 250.

FARWELL J. 1904 ROSE, *In re.* TRUSTEE OF THE PROPERTY OF E. T. ROSE *v.* ROSE.

such powers as the bankrupt can exercise for his own benefit. The exception in the sub-section shews that the powers there referred to are not limited to mere conveyancing powers, but extend to every kind of power. It is a curious casus omissus in the Bankruptcy Act if the trustee cannot extinguish, although he can exercise, a power for the benefit of the estate.

[FARWELL J. referred to *Ex parte Gilchrist.* (1)]

That case turned on the construction of the Married Women's Property Act, 1882. *In re Hirst* (2) may be cited against us. There the Court of Appeal refused under s. 120 of the Lunacy Act, 1890, to release a power vested in a person of unsound mind; but the language of s. 120 of that Act is narrower than s. 44 of the Bankruptcy Act, and renders the decision in that case inapplicable to the present case. It is submitted that the capacity to release a power is a power which the donee of the power can exercise for his own benefit, and therefore it is a power which his trustee in bankruptcy can exercise for the benefit of the bankrupt's estate. Further, by s. 52 of the Conveyancing Act, 1881, a person to whom any power, whether coupled with an interest or not, is given may by deed release, or contract not to exercise, the power. The bankrupt, therefore, at the commencement of his bankruptcy had this statutory power which he could exercise for his own benefit, and that statutory power passed to his trustee in bankruptcy and can be exercised by him for the benefit of the bankrupt's estate.

Jenkins, K.C., and *H. C. Bischoff*, for the trustees of the settlement. Not every right or power a man has will on his bankruptcy pass to his trustee under s. 44 of the Act. A husband's right to administer his deceased wife's estate will not pass: *In the Goods of Turner* (3); nor a power to renew leases: *Simpson* v. *Bathurst.* (4) In *Buckland* v. *Papillon* (5) it was held that an option to take a lease was not a power, and *Nichols* to *Nixey* (6) decided that a trustee in bankruptcy cannot exercise a general power of appointment after the death of the bankrupt. This deed-poll is inoperative. It is not the

(1) (1886) 17 Q. B. D. 521, 536.
(2) [1892] W. N. 177.
(3) (1886) 12 P. D. 18.
(4) (1869) L. R. 5 Ch. 193, 202.
(5) (1866) L. R. 2 Ch. 67.
(6) (1885) 29 Ch. D. 1005.

exercise of a power within the meaning of s. 44. But even if a release of a power is a "power" within the meaning of the section, this is not an exercise of a power which the bankrupt could exercise for his own sole benefit, because it is an interference with the interests of possible issue. If there were children, the power would not pass to the trustee in bankruptcy, and the bankrupt could exercise it. The case of *In re Hirst* (1) is really directly in point, and has always been acted upon as a binding authority. Sect. 52 of the Conveyancing Act, 1881, is merely declaratory of the general law and creates no new power.

E. Ford, in reply.

FARWELL J. The bankrupt in this case has a determinable life interest in a legacy under a will, and he has power to appoint the legacy by deed or will after his death among his own issue and his nephews and nieces; and, in default of appointment, the legacy goes to his children at the age of twenty-one or on marriage in the usual way; and, if no child or appointee attains a vested interest, it goes to himself absolutely. The bankrupt has no child, and the trustee in bankruptcy now desires, in order to sell the bankrupt's contingent interest in remainder, to release that power of appointment so as to make the estate, which the bankrupt has, indefeasible. The question turns on the construction of the 44th section of the Bankruptcy Act, 1883. Now that section describes the property of the bankrupt which is divisible amongst his creditors. The 1st sub-section excludes trust property, tools of his trade, and necessary wearing apparel, and so on; and then the 2nd sub-section enacts that it shall comprise the following particulars: (i.) all such property as may belong to or be vested in the bankrupt at the commencement of his bankruptcy, or may be acquired by or devolve on him before his discharge; and (ii.) the capacity to exercise and take proceedings for exercising all such powers in or over or in respect of property as might have been exercised by the bankrupt for his own benefit at the commencement of his bankruptcy

(1) [1892] W. N. 177.

FARWELL J.
1904
ROSE, *In re.*
TRUSTEE OF THE PROPERTY OF E. T. ROSE *v.* ROSE.

or before his discharge, except the right of nomination to a vacant ecclesiastical benefice. These two heads comprise all the beneficial interests of the bankrupt which are either property properly so called or general powers. It has been held by a series of decisions—although originally, as Kindersley V.-C. points out in *Coffin* v. *Cooper* (1), somewhat contrary to principle—that the donee of a limited power of appointment may release it. It is said that that capacity to release is a power within the meaning of the 2nd sub-section of s. 44—that is to say, that the capacity to release a power is a power, so that we have, as it were, a series of powers: first, a power of appointment; secondly, a power to release the power of appointment; and, thirdly, a power to exercise the power to release the power of appointment, and so on. But in my opinion that is not the meaning of the section. I think the powers referred to are those powers which are familiar to all conveyancers and are powers properly so called. The capacity of releasing a power cannot truly be described as a power at all. I will take the way it is put by Kindersley V.-C., a most accurate lawyer, in *Coffin* v. *Cooper*. (1) He is rather protesting against what he is bound to decide, that the donee of a limited power can release it. He says (2): "First, it was decided that the donee of such a power may release it; in other words, may bind himself not to exercise the power at all, so that any subsequent exercise of the power will be void, whatever circumstances may arise, to make it desirable, with a view to the benefit of the children, that the power should be exercised." That is to say, that the donee has, not what is technically called a power, but the capacity of contracting so as to bind himself from exercising the power which, if he does exercise it, is fiduciary. In my opinion that is not a power within the meaning of this sub-section. Then it is said that the Conveyancing Act of 1881, s. 52, provides that a person to whom any power, whether coupled with an interest or not, is given, may by deed release, or contract not to exercise, the power; and it is urged that that is what is known as a statutory power. In my opinion that is not so. I think this s. 52 only declares what the law

(1) (1865) 2 Dr. & Sm. 365. (2) 2 Dr. & Sm. 375.

was, and does not add anything further. But even if it does add anything further I do not think it is what is called a power. It only declares that a person who has a power has the capacity to release it. That is not a power properly so called. I think, moreover, that I am bound by the decision of the Court of Appeal in the analogous case of *In re Hirst* (1) under s. 120 of the Lunacy Act, 1890, which it is to be observed was passed after the Conveyancing Act, 1881. Sect. 120 of the Lunacy Act provides that the judge may by order authorize and direct the committee of the estate of the lunatic, amongst other things, to "exercise any power, or give any consent required for the exercise of any power where the power is vested in the lunatic for his own benefit or the power of consent is in the nature of a beneficial interest in the lunatic." The words of s. 44 of the Bankruptcy Act are: "The capacity to exercise and to take proceedings for exercising all such powers in or over or in respect of property as might have been exercised by the bankrupt for his own benefit at the commencement of his bankruptcy or before his discharge." I do not myself see any practical difference between the two sections except it may be that s. 120 of the Lunacy Act is a little wider. That section came before the Court of Appeal in *In re Hirst* (1), which was obviously a most meritorious case. The committee desired to have authority to release a power in order that the lunatic, who was tenant for life and had inadequate means of maintenance, might be maintained out of the property, which went in default of appointment to the only son, the child, who desired to have it done. But it was held that the Court could not release the power. I apprehend that that is a decision that the Act of Parliament did not extend to the release of a power. If this case were such as Mr. Upjohn and Mr. Ford have tried to persuade me, namely, that the capacity to release a power can properly be called a power, it would have been within the Lunacy Act just as much as within the Bankruptcy Act. In my opinion it is not so, and I confess I should feel considerable reluctance in extending the anomalous right, which the donee of a special power has to debar himself from exercising it, into

(1) [1892] W. N. 177.

FARWELL J. 1904 ROSE, *In re.* TRUSTEE OF THE PROPERTY OF E. T. ROSE *v.* ROSE.

a right in the trustee in bankruptcy to debar the donee from doing what may be his duty when he desires to exercise it. Although I am bound by the authorities to hold that the donee of a limited power (who can exercise the power) can release it, I am not driven to hold that a man, not the donee of the power and who cannot exercise the power, whatever happens, can yet release it. The result is that this application fails, and I dismiss it with costs.

Solicitors: *Hilbery & Son; Bompas, Bischoff & Co.*

H. L. F.

FARWELL J. 1904 *July* 9.

In re BEST. JARVIS *v.* CORPORATION OF BIRMINGHAM.

[1904 B. 2046.]

Charity—Will—Construction—Gift for "Charitable and Benevolent Institutions" not void for Uncertainty.

A bequest of residue upon trust for "such charitable and benevolent institutions" as the trustees shall in their discretion determine is not void for uncertainty, but is a good charitable gift.

In re Sutton, (1885) 28 Ch. D. 464, followed.

Dictum of Lord Cottenham in *Ellis* v. *Selby*, (1836) 1 My. & Cr. 292; 43 R. R. 188, disapproving of *Jemmit* v. *Verril*, (1826) cited in Amb. 585, n., not followed.

ADJOURNED SUMMONS.

Thomas Best by his will dated June 12, 1899, after appointing the plaintiffs R. C. Jarvis and H. Munslow to be the executors and trustees thereof, and after giving divers pecuniary legacies, devised and bequeathed all his real and personal estate to the plaintiffs upon trust for sale and conversion, and to pay out of the proceeds of such sale and conversion his funeral and testamentary expenses and debts and legacies with the duties thereon, and to pay the residue "to the lord mayor and corporation for the time being of the city of Birmingham, to whom I give and bequeath the same upon trust to apply the same and the income thereof in aid of such charitable and benevolent institutions in the city of Birmingham and in the Midland

Counties, and including any educational institution which is the subject of a public subscription, in such manner and in such proportions as the lord mayor and general purposes committee for the time being of the said corporation shall in their sole discretion from time to time determine and direct."

The testator died on June 1, 1903, and his will was duly proved by the plaintiffs. This was an originating summons to determine whether the trust contained in the will in favour of such charitable and benevolent institutions in the city of Birmingham and in the Midland Counties as the corporation of Birmingham should determine was valid, or whether there was an intestacy as regards the residuary estate.

E. P. Hewitt, for the plaintiffs.

Tindal Methold, for the corporation. *In re Sutton* (1) governs this case. The testator here was alluding to one class of objects. The words "charitable and benevolent institutions" mean charitable institutions of a benevolent character. In the Scotch cases of *Hill* v. *Burns* (2) and *Miller* v. *Black's Trustees* (3), a bequest for "charitable and benevolent purposes" was held good.

H. S. Preston, for the next of kin of the testator. The Scotch cases do not apply because the statute 43 Eliz. c. 4, does not extend to Scotland, and the Scotch Courts will not administer a trust at all. The distinction between English and Scotch law in this respect is pointed out by Lord Stormonth-Darling in *Cobb* v. *Cobb's Trustees* (4), and by Lord Robertson in *Blair* v. *Duncan*. (5) The words "charitable and benevolent" have been held bad in England. There is the old case of *Jemmit* v. *Verril* (6), in which a bequest of residue upon trust for "such charitable and benevolent purposes" as the trustees should determine was in the first instance upheld; but the decision was disapproved of by Lord Cottenham in *Ellis* v. *Selby* (7), where he states that it is "directly at variance with the other cases on the same subject"; and in Tyssen on

(1) 28 Ch. D. 464.
(2) (1826) 2 Wils. & S. 80.
(3) (1837) 2 Sh. & McL. 866, 891.
(4) (1894) 21 R. 638, 640.
(5) [1902] A. C. 37.
(6) Amb. 585, n.
(7) 1 My. & Cr. 286, 292; 43 R. R. 188.

FARWELL J. 1904 BEST, *In re.* JARVIS *v.* BIRMINGHAM CORPORATION.

Charitable Bequests, p. 200, *Jemmit* v. *Verril* (1) is referred to as being no longer law. The word "benevolent" has obviously no wider meaning than the word "charitable," and there may be benevolent institutions that are not charitable. It is submitted that the testator here has indicated two classes of institutions, namely, "charitable" and "benevolent," and that the conjunction "and" is equivalent to "or." If this is so, it is clear that the gift is too indefinite and is void for uncertainty: *Williams* v. *Kershaw* (2); *In re Jarman's Estate* (3); *In re Sutton.* (4)

FARWELL J. On the construction of this will apart from the authorities, I do not feel much difficulty in saying that this is a good charitable gift. I am much obliged to Mr. Preston for his ingenious argument, and I agree with him that the Scotch cases do not apply, for the reasons given by Lord Stormonth-Darling and by Lord Robertson. But the words here are upon trust for "such charitable and benevolent institutions" in the city of Birmingham, and so on, as the lord mayor shall determine, and it appears to me that the institutions, the objects of this gift, must be both charitable and benevolent. Having regard to the curiously technical meaning which has been given by the English Courts to the word "charitable," I am not surprised that the testator should have desired that the institutions should be not only charitable, but should be also benevolent. There are certainly some which I think it would be difficult to say are benevolent, such as the distribution of the works of Joanna Southcote (5), although that was held to be charitable. I think the testator here intended that the institutions should be both charitable and benevolent; and I see no reason for reading the conjunction "and" as "or." So far as the authorities are concerned, there is the direct decision of Pearson J. in the case of *In re Sutton* (4), which I am prepared to follow. Some doubt is raised by the case of *Jemmit* v. *Verril* (1), which is very diffi-

(1) Amb. 585, n.
(2) (1835) 5 L. J. (N.S.) (Ch.) 84; 5 Cl. & F. 111, n.; 42 R. R. 269.
(3) (1878) 8 Ch. D. 584.
(4) 28 Ch. D. 464.
(5) (1862) 31 Beav. 14.

cult to distinguish from the present case, and which Lord Cottenham in *Ellis* v. *Selby* (1) treated as wrongly decided. However, he did not in terms overrule it. His dictum was only an interlocutory observation made in the course of the argument, and I do not think that I ought to allow it to outweigh the express decision of Pearson J., which is, I think, in accordance with the tendency of the Courts of late years. Therefore I shall follow *In re Sutton* (2), and hold that this is a good charitable gift.

Solicitors: *Stow, Preston & Co., for A. Pointon, Birmingham; Sharpe, Parker & Co., for the Town Clerk of Birmingham; The Treasury Solicitor.*

H. L. F.

In re CLIFTON'S PATENT.

Patent—Petition for Revocation—Hearing in Court.

A petition for revocation of a patent should be heard in open Court, and not, even by consent, in chambers.

Observations on *In re Scott's Patent*, (1903) 20 Rep. Pat. Cas. 604.

CHARLES HENRY CLIFTON obtained on July 5, 1900, letters patent for improvements in circular saws.

Joseph Hill, on February 27, 1904, presented a petition for revocation of the patent on the grounds of want of novelty and impropriety of subject-matter.

On March 12, 1904, the patentee being then out of the jurisdiction, the petitioner applied for directions as to the hearing of the petition, and for an order in the form made in *In re Drummond's Patent*. (3) Byrne J. ordered that the hearing of the petition should take place as the hearing of an action with witnesses, and be set down in the list accordingly, unless the respondent should, within fourteen days after service of the order on him, shew cause to the contrary.

The respondent was willing to consent to an order for revocation of the patent, and the petitioner applied by summons in chambers for an order on the petition revoking the patent, such

(1) 1 My. & Cr. 292; 43 R. R. 188. (2) 28 Ch. D. 464.
(3) (1889) 6 Rep. Pat. Cas. 576.

BUCKLEY J.

1904

CLIFTON'S PATENT, *In re.*

order to be in the terms of minutes annexed to the summons: see *In re Scott's Patent.* (1)

Buckley J. refused to make an order for revocation in chambers, and the petition subsequently came on for hearing in Court.

J. W. Gordon, for the petitioner and respondent.

BUCKLEY J. In this case a petition for the revocation of a patent has been presented under s. 26 of the Patents, Designs, and Trade Marks Act, 1883. The respondent, after the petition had been presented, was prepared to consent to judgment for revocation, and a summons was issued to obtain judgment for revocation in chambers without bringing the matter on in Court. That process was adopted in reliance upon something which my brother Joyce was supposed to have decided in *In re Scott's Patent.* (1) I have taken the opportunity of mentioning the matter to Joyce J., and he has informed me that he had no intention of deciding in that case that it was proper to obtain judgment for revocation in chambers. Under these circumstances I feel myself free to do what in my judgment seems right. The summons came before me in chambers, but I declined to deal with it there, for a petition presented under the statutory jurisdiction for the revocation of a patent is, I think, a matter which ought to be dealt with in Court. The statute provides that the application is to be by petition—a well-known way of approaching the judge in Court, as distinguished from the judge in chambers. Primâ facie, a petition is a matter to be adjudicated upon in Court, and where the relief sought is the revocation of a patent, I think it is expedient that the relief should be given in open Court and not in chambers. For this reason I refused to give judgment for revocation on summons in chambers, and the petition is now brought on to be dealt with in Court. I now pronounce judgment for revocation by consent.

Solicitors for petitioner: *Baker, Baker & Co.*

Solicitors for respondent: *Wilson, Bristows & Carpmael.*

(1) 20 Rep. Pat. Cas. 604.

F. E.

BUCKLEY J.
1904
July 5.

In re PRETORIA PIETERSBURG RAILWAY COMPANY (No. 2).

[0092 of 1904.]

Company—Winding-up (Voluntary)—Creditor out of Jurisdiction claiming to prove—Security for Costs—Companies (Winding-up) Rules, 1903, *r.* 201.

Where a creditor residing out of the jurisdiction applies in a voluntary winding-up for a declaration that he is entitled to prove in the winding-up, the Court has jurisdiction to require him to give security for costs.

And *semble*, that wherever a person out of the jurisdiction comes forward as an actor in a winding-up, whether voluntary, or under supervision, or by the Court, the ordinary practice of the Court as to ordering security for costs applies.

THE Pretoria Pietersburg Railway Company, Limited, having passed resolutions for voluntary winding-up and appointed liquidators therein, Jan Volker issued an originating summons in the winding-up against the liquidators, in which he described himself as of the Engineers' Department, Holland Iron Railway Company, Haarlem, in the Kingdom of Holland, engineer, and claimed, as a creditor of the company in winding-up, that it might be determined and declared that he was entitled to prove as a creditor for 120*l.*

The liquidators issued a summons asking that the claimant (being out of the jurisdiction of the Court) might be ordered to give security for costs in the sum of 25*l.*, and that in the meantime all further proceedings on his part might be stayed.

The Registrar in Companies Winding-up, on May 12, 1904, made the following order on the liquidators' summons: "This Court doth not think fit to make any order upon the said application except that the costs of the applicants, the said liquidators, of the said application, be included in the costs of the winding-up."

The liquidators appealed from the order to the Court of Appeal, which directed that an application to discharge the registrar's order should be made to the judge having jurisdiction in the winding-up of companies. (1) The liquidators

(1) Ante, p. 170.

BUCKLEY J.
1904
PRETORIA PIETERSBURG RAILWAY (No. 2), *In re.*

accordingly moved on notice, before Buckley J., that the order of the registrar might be discharged, and that security for costs in the sum of 25*l.* might be ordered, and for a stay of the claimant's proceedings in the meantime.

Younger, K.C., and *H. C. Bischoff*, for the liquidators, in support of the motion. Rule 201 of the Companies (Winding-up) Rules, 1903, provides that "in all proceedings in or before the Court" having winding-up jurisdiction, "or any judge registrar or officer thereof, or over which the Court has jurisdiction under the Acts and Rules, where no other provision is made by the Acts or Rules, the practice procedure and regulations shall, unless the Court otherwise in any special case directs, in the High Court be in accordance with the Rules of the Supreme Court and practice of the High Court." There being no express provision in the Acts or Rules specially applicable to winding-up, the High Court practice applies, and the Court will order the claimant to give security for costs.

In a compulsory winding-up, North J. held that the Court had jurisdiction to order a claimant out of the jurisdiction to give security for costs; and pointed out that in *In re Vanderhaege* (1) the decision that security could not be ordered in the case of a creditor out of the jurisdiction claiming to prove in bankruptcy turned on the Bankruptcy Rules: *Fontaine's Case.* (2)

If the claimant were bringing an action to recover his debt he would be ordered to give security: *Crozat* v. *Brogden.* (3) There ought not to be a difference because the claimant is proceeding by summons in the winding-up.

W. R. Bisschop, for the claimant. The Court cannot order the claimant to give security. Bankruptcy Rules, 1886, rr. 131, 148, and 353 apply, and on these rules it has been held that security cannot be ordered: *In re Vanderhaege* (1); *In re Semenza.* (4)

In winding-up there is no settled practice, and if the Court has power to order security, it has a discretion to refuse to

(1) (1887) 20 Q. B. D. 146.
(2) (1889) 41 Ch. D. 118, 124.
(3) [1894] 2 Q. B. 30.
(4) [1894] 1 Q. B. 15.

order it, which ought to be so exercised in the present case. It is only under special circumstances that security will be ordered: *In re Milward & Co.* (1)

BUCKLEY J. In this case a person out of the jurisdiction took out an originating summons asking that it might be determined that he was entitled to prove in the winding-up as a creditor for 120*l*. The liquidators applied for an order on him to give security for costs. The registrar refused to make the order, and this application is in substance an appeal from that refusal. Having regard to the fact that s. 138 of the Companies Act, 1862, as amended by s. 25 of the Companies Act, 1900, gives a creditor of a company in voluntary winding-up the right to apply to the Court "to determine any question arising in the matter of such winding-up," instead of bringing an action for his debt, it would be a strange result if security for costs could be ordered in the case of an action and not in the case of the summary method of procedure by summons in the winding-up. Let me see whether that is so. It is well settled as a general rule that if a person resident abroad is an actor or plaintiff in proceedings in an English Court (not being a defendant in an action who is plaintiff in a cross-action, nor being a plaintiff suing a defendant who already has money of the plaintiff in his hands which in fact gives him security), and has not assets within the jurisdiction which can be reached, he may, except in special circumstances, be ordered to give security for costs. Then rule 201 of the Companies Rules of 1903 says that in winding-up proceedings, "where no other provision is made by the Acts or Rules, the practice procedure and regulations shall, unless the Court otherwise in any special case directs, in the High Court be in accordance with the Rules of the Supreme Court and practice of the High Court." Having regard to that rule, primâ facie the ordinary rule of the High Court as to ordering security for costs applies in winding-up proceedings. But for the claimant it is contended that in the winding-up of a company the Rules under the Bankruptcy Act, 1883, apply. That is not so. In the first place, rule 353 of the

(1) [1900] 1 Ch. 405.

BUCKLEY J.
1904
PRETORIA PIETERSBURG RAILWAY (No. 2), *In re.*

Bankruptcy Rules, 1886, says that "save as provided by these rules, or rules amending them, the Rules of the Supreme Court shall not apply to any proceeding in bankruptcy": a provision exactly contrary to what is provided by rule 201 of the Companies Rules of 1903. Secondly, rule 131 of the Bankruptcy Rules provides for security for costs of an appeal, and rule 148 relates to security for costs by a petitioning creditor who is resident abroad; and the Court of Appeal, in *In re Semenza* (1), decided that those special provisions as to the persons who might be ordered to give security for costs in bankruptcy proceedings tended to shew that in other cases in bankruptcy it was not intended that security for costs should be ordered, and that there was no rule justifying the ordering of security in the case then before the Court. There is no similar inference to be drawn from the Companies Rules. There are in the case of winding-up no rules like Bankruptcy Rules 131 and 148, and, further, rule 201 of the Companies Rules is exactly the contrary of rule 353 of the Bankruptcy Rules.

In my judgment the ordinary practice of the Court applies in this case, and wherever a person resident abroad comes forward as an actor in a winding-up, whether voluntary, or under supervision, or by the Court, the ordinary rule as to security for costs applies.

I therefore discharge the order of the registrar, and order the claimant to give security in the sum of 25*l*.

Solicitors for liquidators: *Bompas, Bischoff, & Co.*
Solicitors for claimant: *Cayley & Cayley.*

(1) [1894] 1 Q. B. 15.

F. E.

In re JONES & EVERETT.

BUCKLEY J.

1904

July 9.

[1904 J. 758.]

Costs—Taxation—Creditor in Administration Action—"Party interested"—Solicitors Act, 1843 (6 & 7 *Vict. c.* 73), *s.* 39.

A creditor who has obtained judgment for the administration of the estate of a deceased testator is "a party interested" within the meaning of s. 39 of the Solicitors Act, 1843, and is therefore entitled to an order for delivery and taxation of bills of costs which have been paid by the testator's executor.

In re Leadbitter, (1878) 10 Ch. D. 388, explained.

Eliza Walters died on November 17, 1902, having appointed her husband, William Alfred Walters, her executor, and he proved the will.

Messrs. Roberts Jones & Everett acted for the executor as his solicitors in obtaining probate of the will, and in the administration of the estate, and also in an action brought against him in May, 1903, by Henry Frazer, a creditor of the testatrix, for the administration of the estate.

Judgment for administration by the Court was pronounced on July 25, 1903, and in October, 1903, the defendant filed his accounts, and among the payments alleged to have been made by him were the following three sums paid to Messrs. Roberts Jones & Everett, namely—(1.) the sum of 98*l.* 11*s.* 10*d.*, paid for estate duty; (2.) the sum of 93*l.* 13*s.* 8*d.*, costs of an attempted sale, preparation of sale bill, negotiating with intending purchasers, preparation of conditions of sale, arranging temporary loans and completing mortgages therefor, &c.; (3.) the sum of 24*l.* 10*s.*, costs of conveyance of property sold, including deducing title, &c.

On April 20, 1904, Frazer took out an originating summons against Roberts Jones & Everett, asking for delivery and taxation of the three bills of the costs included in the above three items. At the hearing he asked for taxation as to one only of the bills.

BUCKLEY J.
1904
JONES & EVERETT, *In re.*

Peterson, for the applicant. The three items have been paid out of the estate, and the only persons interested are the creditors, one of whom is the applicant.

By s. 39 of the Solicitors Act, 1843, "in any case in which a trustee, executor, or administrator has become chargeable with" a solicitor's bill of fees, charges, and disbursements, the Court may "upon the application of a party interested in the property out of which such trustee, executor, or administrator may have paid or be entitled to pay such bill . . . . refer the same . . . . to be taxed." The applicant is "a party interested" within the meaning of this section. The exact point is not covered by authority, but a legatee has been held to be within the section: *In re Blackmore*. (1) A trustee in bankruptcy is not a trustee within the section, and the bankrupt, even after all the creditors have been paid in full, is not "a party interested" within the meaning of the section: *In re Leadbitter*. (2) It is unnecessary to prove that the estate is insolvent, for the applicant is interested in the property if not in the amount paid, although other persons may also be interested.

Apart from taxation, the applicant is entitled, under s. 40 of the Act, to delivery of the bills of costs: *Duffett* v. *McEvoy* (3); *In re Baylis*. (4)

Bailhache, for the respondents. A creditor is not "a party interested" within the meaning of s. 39 of the Act of 1843: Poley on Solicitors, pp. 408, 409, citing *In re Leadbitter*. (2) In that case, in the Court of Appeal, Jessel M.R. says (5): "It has always been held that the words 'party interested' mean a party interested under the trust deed, will, or intestacy; and, of course, the 'trustee' must be a person really chargeable with the bill of costs." A creditor has a right of action only against and not an interest in the property. He does not take anything under a trust deed or will or intestacy; his claim is under the contract in respect of which his debt was incurred.

If the applicant is not within s. 39, he cannot obtain taxation at all: *In re Jackson*. (6)

(1) (1851) 13 Beav. 154.
(2) 10 Ch. D. 388.
(3) (1885) 10 App. Cas. 300.
(4) [1896] 2 Ch. 107.
(5) 10 Ch. D. 391.
(6) (1889) 40 Ch. D. 495.

BUCKLEY J. The applicant is a creditor of a deceased person whose estate is being administered by the Court under a judgment obtained by the applicant in July, 1903. He now asks for delivery by the respondents of three bills of costs, and for taxation of one of them. The only point which I have to decide is whether he is "a party interested" within the meaning of s. 39 of the Solicitors Act, 1843. I think he is. Where a creditor is pursuing against the estate of a deceased person his rights in respect of his debt he is enforcing a right in equity to compel the executor to account for the property in his hands, and to administer it in a due course of administration by paying the creditor and other persons in a like position. In my judgment he is "a party interested in the property" within the meaning of s. 39. He has no personal right against the executor; his right is against the property in the hands of the executor.

The argument for the respondents was founded on some words used by Jessel M.R. in *In re Leadbitter*. (1) It is common ground that the decision in that case has nothing to do with the point raised in this case. The question there was whether a trustee in bankruptcy was a trustee for the bankrupt himself, and therefore whether s. 39 of the Act applied. It was held that he was not, that the relative position of the bankrupt and his trustee is the same as that which existed between the bankrupt and his assignee in bankruptcy when the Act of 1843 was passed, and that he was only bound to account to the bankrupt for any surplus assets that remained after paying all the creditors. However, in the course of his judgment Sir George Jessel says (2): "It has always been held that the words 'party interested' mean a party interested under the trust deed, will, or intestacy." The respondents' counsel is unable to refer me to any case in which it was so held, and I do not think that Sir George Jessel meant what the respondents' counsel says he meant. I think Sir George Jessel was contrasting the position of a trustee under a deed or a will with that of a trustee in bankruptcy. He had already said that the question before him was whether a bankrupt

(1) 10 Ch. D. 388. (2) 10 Ch. D. 391.

BUCKLEY J. 1904 JONES & EVERETT, *In re.*

after his discharge—where the creditors had been paid in full and the surplus, if any, belonged to the bankrupt — could apply to tax a bill of costs paid by the trustee during the bankruptcy and before the bankrupt's discharge; and after referring to the section, he used the words which I have read. But he was not attempting to say that a creditor who after the death of his debtor was enforcing his rights against that person's estate was not "a party interested" in that property. That case was not present to his mind. In my judgment a creditor who looks to his deceased debtor's property for payment and is pursuing his remedy to enforce payment out of it is "a party interested" within the meaning of s. 39.

I therefore order delivery of the three bills of costs and taxation of one of them.

Solicitors for applicant: *Storey, Cowland & Hill, for Merrils & Ede, Cardiff.*

Solicitor for respondents: *J. T. Lewis, for Roberts Jones & Everett, Cardiff.*

F. E.

PORTER *v.* MOORE.

SWINFEN EADY J.

[1903 P. 1826. Manchester.]

1904

Estoppel—Statement induced by Misrepresentation—Concealment of Material Fact.

June 17, 18, 20.

A person cannot rely by way of estoppel on a statement induced by his own misrepresentation, or by his concealment of a material fact the disclosure of which would have been calculated to make his informant hesitate or seek for further information before making the statement, or where the circumstances would have deterred a reasonable man from acting on it.

Intending mortgagees of a trust fund induced a trustee to sign a memorandum that he had not received any notice of a prior charge, without informing him that the particular form of memorandum had been submitted to and was still under the consideration of his solicitors, whose practice was to refuse to advise trustees to sign such documents, and also, though perhaps unintentionally, giving him the impression that he was signing it with their approval.

The mortgagees were definitely informed before completion that the solicitors never advised trustees to sign the particular form of memorandum.

Some time after completion it was discovered that the trustee had received and forgotten a notice of a prior charge:—

Held, that the mortgagees could not rely on the memorandum by way of estoppel.

George Whitechurch, Ld. v. *Cavanagh*, [1902] A. C. 117, 145, and *Low* v. *Bouverie*, [1891] 3 Ch. 82, 113, applied.

WITNESS ACTION.

By his will dated August 28, 1861, Thomas Nield bequeathed a sum of 6000*l.* to his trustees in trust for his daughter Mary Cordingley for life, and after her decease for her children as she should by deed or will appoint.

Thomas Nield died on October 10, 1861.

By an indenture dated April 16, 1880, Howe and Moore were appointed trustees of the will, and the said sum of 6000*l.* and the securities for the same were vested in them.

By a deed-poll dated June 6, 1882, Mary Cordingley appointed 1000*l.* to her son Charles Henry Cordingley, which sum was with her consent raised and paid to him.

By an indenture dated July 10, 1890, and made between Mary Cordingley of the one part and her son Edward Cordingley

SWINFEN EADY J.
1904
PORTER v. MOORE.

of the other part, Mary Cordingley appointed 1400*l.* to Edward Cordingley, to be paid to him within two months from the time of her decease.

By an indenture dated August 23, 1890, and made between Edward Cordingley of the one part and Whitla of the other part, and hereinafter referred to as the prior charge, Edward Cordingley assigned the said sum of 1400*l.* to Whitla by way of mortgage to secure 600*l.* and interest.

On or about April 3, 1894, notice of the prior charge was duly served on the trustees.

By her will dated November 30, 1899, Mary Cordingley appointed that the moneys comprised in the power should be divided as follows—namely, 2000*l.* to Edward Cordingley, 2000*l.* to her daughter Emma Ollis, and 1000*l.* to Charles Henry Cordingley, these sums, together with the 1000*l.* advanced to Charles Henry Cordingley, making up the moneys comprised in the power, and that all accretions should be divided in the same proportions.

Mary Cordingley died on February 28, 1900.

In April, 1900, Edward Cordingley applied to a solicitor for an advance of 1500*l.* upon his share without disclosing the prior charge, and the solicitor, acting for himself and his co-mortgagees, agreed to make the advance if the title was satisfactory.

On May 1, 1900, the mortgagees' solicitor told the managing clerk of the trustees' solicitors that the trustees must sign a memorandum that they had received no notice of any prior charge. The managing clerk replied that it was not the practice of his principals to advise trustees to sign such documents, but if the form of memorandum required were sent it should be submitted to his principals.

On Friday, May 4, 1900, the mortgagees' solicitor wrote to the trustees' solicitors as follows: "I herewith forward notice which I shall be obliged if you will please have signed by the trustees and returned to me . . . . I require a declaration of identity by Dr. Moore, who I understand attended the birth of the proposed mortgagor, and shall be glad to know first thing to-morrow morning if you have any objection to my

arranging to obtain the same direct from Dr. Moore, as I understand he is an elderly gentleman and it is somewhat difficult to get him to town, and I will take a commissioner and Mr. Cordingley with me."

He enclosed a notice or memorandum in the form ultimately signed.

This letter was delivered on Saturday, May 5.

On the same day the mortgagees' solicitor called to see if there was any answer, but the managing clerk being out or engaged, and the partner who attended to the business being away, he only saw a junior clerk who had no authority to deal with the matter. He asked the junior clerk whether he thought there would be any objection to his seeing the trustees personally and obtaining the memorandum and declaration of identity. The junior clerk said he thought there would be no objection; and the mortgagees' solicitor thereupon said he should assume there was no objection unless he heard to the contrary on Monday morning.

Early on Monday, May 7, the mortgagees' solicitor received a letter from the trustees' solicitors saying (inter alia): "We have no objection to your attending upon Dr. Moore to obtain from him the declaration of identity which you require."

They did not mention or return the form of memorandum which they had indorsed, "We decline to advise the trustees to sign this notice"; and a verbal message to the same effect which they had sent by Edward Cordingley was apparently not delivered.

On receipt of this letter the mortgagees' solicitor sent a clerk with Edward Cordingley and a commissioner for oaths to obtain Moore's signature to the declaration of identity and the memorandum, of which a fresh copy was made.

The evidence as to what took place at the interview was conflicting; but the result, as found by the Court, was as follows: "Moore, who had at first expressed a wish to consult his solicitors, signed the memorandum on the faith of a statement made by the clerk that the trustees' solicitors had been communicated with, and that everything was perfectly right. Now the clerk, of course, knew of his principal's application to

SWINFEN EADY J.
1904
PORTER v. MOORE.

the trustees' solicitors for permission to approach Moore, and, possibly without fully appreciating what he was doing, thought he was justified in saying that everything was all right. But Moore certainly took, and had ground for taking, what was said as meaning that the declaration and the memorandum were both being signed with his solicitors' assent, and that he was being approached with his solicitors' knowledge for both purposes. No explanation of the memorandum was given to Moore, and he signed it in reliance upon the statement conveyed to him in that way that his solicitors considered it all right."

The memorandum was as follows: "We have not received notice nor are we aware that Edward Cordingley, a son of Mary Cordingley, has assigned, settled, charged, or otherwise incumbered the share and interest appointed to him of and in a sum of 6000*l.* to which the children of Mary Cordingley are entitled under the will of Thomas Nield, late of Ashton-under-Lyne in the county of Lancaster, cotton spinner and manufacturer, deceased, dated the 28th day of August, 1861, of which will we are the present trustees."

Moore, who had entirely forgotten the prior charge, was not warned of the risk he was running in signing such a memorandum, or told that the form had been sent to and was still under the consideration of his solicitors, whose practice was to refuse to advise trustees to sign such documents. All previous trust documents had been signed at his solicitors' office.

On May 8 Edward Cordingley brought Howe to the mortgagees' solicitor's office. Howe was in too great a hurry to listen to the solicitor's explanation, and signed the memorandum in reliance on Moore's signature.

On the same day the mortgagees' solicitor wrote to the trustees' solicitors for an assurance that they (i.e., the solicitors) had not received notice of Edward Cordingley having assigned or dealt with his interest.

On the same day the trustees' solicitors replied: "We never give any such assurance as that asked from us by your letter just to hand, nor do we advise trustees to do so. This trust has existed for about forty years, and in our hands for more

than twenty, and it would involve a long search and perusal of correspondence before we could feel any confidence in making any such statement; but we have no hesitation in saying that we have no recollection of having received any notice of charge effected by Mr. Edward Cordingley."

The trustees' solicitors had in fact received one or two letters relating to the prior charge about a month previously, but these letters had entirely escaped their recollection.

The transaction was thereupon completed, and by a mortgage of May 8, 1900, Edward Cordingley assigned his share and interest in the said sum of 6000*l.* to the mortgagees by way of mortgage to secure the payment of the sum of 1500*l.* and interest.

On February 12, 1901, the trustees' solicitors wrote to the mortgagees' solicitor informing him that they had learned that day of the appointment of the 1400*l.* and the prior charge, and stating that Mary Cordingley's will must be construed by the Court. This was the first time the mortgagees had notice of the prior charge.

The will was subsequently construed, and the prior charge established in the Palatine Court. It was held that the appointment of the 2000*l.* by Mary Cordingley's will was in confirmation and not in addition to the appointment of the 1400*l.* by deed, and that two-fifths of the trust funds belonged to Edward Cordingley or those claiming through him.

Owing to the prior charge, interest, and costs thereon the mortgagees only received 636*l.*

Edward Cordingley was a person of no means and out of the jurisdiction.

On June 25, 1903, the mortgagees commenced this action against the trustees, claiming a declaration that they held Edward Cordingley's share as trustees for the mortgagees, and were estopped as against the mortgagees from alleging or setting up in discharge any incumbrance prior to that of the mortgagees, and consequential relief.

Howe died on July 11, 1903, after service and before appearance; and on October 24, 1903, the proceedings were ordered to be carried on against his executors.

SWINFEN EADY J.

1904

PORTER v. MOORE.

Eve, K.C., and *Alexander Grant*, for the mortgagees. The memorandum is free from ambiguity. The mortgagees were justified in acting on it, and the defendants are estopped from setting up the prior charge: *Low* v. *Bouverie*. (1)

Hon. E. C. Macnaghten, K.C., and *Muir Mackenzie*, for Moore. The circumstances under which the memorandum was obtained and acted on preclude estoppel.

In the first place, Moore signed it under the belief induced, though perhaps unintentionally, by the mortgagees' agent that he was signing it with his solicitors' approval.

Secondly. The material fact that the form of memorandum had been sent to and was still under the consideration of the trustees' solicitors, whose managing clerk had said it was not their practice to advise trustees to sign such documents, but that he would submit it to his principals, was suppressed.

This is in itself sufficient to preclude estoppel: *George Whitechurch, Ld.* v. *Cavanagh*. (2)

Thirdly. After the trustees' solicitors' letter of May 8, which was received before completion, no reasonable person would have acted on the memorandum.

There was, therefore, no estoppel: *Low* v. *Bouverie*. (3)

T. C. Eastwood and *Arnold Herbert*, for Howe's executors. Howe, who was approached without any permission at all, merely signed in reliance on Moore's signature, and the same argument applies.

Eve, K.C., in reply. First. Moore's belief was not justified by the statements actually made at the interview. There was no intention to mislead him, and it does not appear that any one was aware he was misled.

Secondly. The mortgagees' solicitor was not aware that the trustees' solicitors had in fact determined not to advise the trustees to sign the memorandum. The fact that it would be contrary to their general practice, but that they were considering this particular memorandum, was not a material fact within Lord Brampton's observations in *George Whitechurch, Ld.* v. *Cavanagh*. (2) Those observations referred to facts raising a

(1) [1891] 3 Ch. 82. (2) [1902] A. C. 117, 145.
(3) [1891] 3 Ch. 82, 113.

suspicion that something was wrong, and suggesting further inquiry. They have no application to the present case.

Thirdly. The letter of May 8 was in answer to an application for a personal assurance from the trustees' solicitors. It is not unusual to apply for this in addition to the trustees' assurance. The solicitors refused to give their personal assurance, and said they never advised trustees to do so. But there was nothing in that to raise any suspicion as to the correctness of the memorandum already obtained. If there had been, it could not of course have been relied on.

SWINFEN EADY J. (after stating the facts). The truth is that all parties had forgotten the prior charge. It had even escaped the notice of the trustees' solicitors, although in the previous month they had received one or two letters relating thereto. It only shews what care and caution are necessary where a trustee is asked to sign such a memorandum as the present, and how imprudent it is in any case to give such an assurance without carefully looking through the various papers of the trust, which in this case had lasted nearly forty years, to see whether there is not a notice of some charge, settlement, or dealing that has passed away from the mind, but is recorded among the papers.

The plaintiffs contend that the memorandum signed by the trustees creates an estoppel. It is clear and unambiguous in its terms, and was no doubt advisedly drawn by a lawyer in that form. [His Lordship read the memorandum.] The question is whether, having regard to the circumstances under which the signatures were obtained, the mortgagees can rely upon that document.

In *George Whitechurch, Ld.* v. *Cavanagh* (1) Lord Brampton said: "In my judgment no representations can be relied on as estoppels if they have been induced by the concealment of any material fact on the part of those who seek to use them as such; and if the person to whom they are made knows something which, if revealed, would have been calculated to influence the other to hesitate or seek for further

(1) [1902] A. C. 117, 145.

SWINFEN EADY J.

1904

PORTER v. MOORE.

information before speaking positively, and that something has been withheld, the representation ought not to be treated as an estoppel."

Again, in *Low* v. *Bouverie* (1) Kay L.J. said: "Whether this suit be treated as in equity or at law, the essence of the plaintiff's case must be that he was misled by the statement. The Court must be satisfied of this. If there was fraud, and the statement was intended to mislead, its ambiguity would not be a defence; but where no fraud is alleged, it is essential to shew that the statement was of such a nature that it would have misled any reasonable man, and that the plaintiff was in fact misled by it."

I am quite satisfied that if Moore had been told that the form of memorandum had been sent to and was still under the consideration of the trustees' solicitors, whose managing clerk had said it was not their practice to advise trustees to sign such documents, but that he would submit it to his principals, Moore would not have signed it. He wanted to consult his solicitors, and only signed the memorandum because he thought he was doing so with their approval. If he had been told the facts, as then known to the mortgagees' solicitor and his clerk, he would not have signed. Can it be said that under these circumstances the mortgagees' solicitor was justified in acting upon a document so obtained?

There is the further fact, that before the memorandum was acted on, the letter of May 8 had been received from the trustees' solicitors, so that the mortgagees' solicitor knew before completion that the trustees' solicitors never gave nor advised trustees to give the very assurance that he had just obtained without their knowledge. He had only asked and received permission to attend Moore to obtain the declaration of identity, and he gave no intimation to the trustees' solicitors that he was about to obtain or had obtained the trustees' signatures to the memorandum.

Under these circumstances I am of opinion that the memorandum cannot be set up as an estoppel; that no reasonable person would have acted upon it knowing the circumstances

(1) [1891] 3 Ch. 82, 113.

as the mortgagees' solicitor knew them, and that the circumstances attending the obtaining the trustees' signatures to the memorandum and down to the date when it was acted on are such as to estop the mortgagees from praying in aid any estoppel. The result is that the action against Moore fails and must be dismissed with costs.

Owing to Howe's death, his evidence is not available; but having regard to the fact that the memorandum was not signed in the trustees' solicitors' office, the ordinary place in which the trust documents were signed, that Moore had already signed when Howe was asked to do so, that Howe was in a hurry, and that he was not informed of the communications between the mortgagees' and trustees' solicitors, I am of opinion that the same result must follow in his case as in Moore's case.

Solicitors: *R. S. S. Walker, for Robert Scholes, Manchester; Grant, Bulcraig & Co., for Parker & Ayre, Manchester; Bower, Cotton & Bower, for Rylance & Sons, Manchester.*

G. R. A.

WARRINGTON J.

1904

June 29, 30.

HARRIS *v.* BOOTS, CASH CHEMISTS (SOUTHERN), LIMITED.

[1904 H. 381.]

Lessor and Lessee—Negative Covenants—Alterations—Assignment of Lease—Covenant "to perform and observe" original Covenants—Right of Assignee to enforce Negative Covenant—Indemnity.

The true object of the covenant by the assignee usually inserted in an assignment of leaseholds is merely to indemnify and protect the lessee against breach of covenants contained in the lease, and consequently a lessee is not entitled to enforce by injunction the specific performance by his assignee of the negative covenants contained in the original lease by means of the covenant "to perform and observe" the covenants and conditions contained in the lease, and to indemnify the assignor from and against all claims and demands on account of the same.

Observations in *In re Poole and Clarke's Contract*, ante, p. 173, discussed and applied.

Semble: A covenant to perform and observe the negative covenants in a lease is not of itself a negative covenant within the rule which binds the Court to grant an injunction on evidence of its breach.

ACTION.

The only question raised by this action which calls for any report was as to the right of the assignor of leasehold premises to enforce by injunction the specific performance by his assignee of the negative covenants contained in the original lease by means of the usual covenant by the assignee "to perform and observe" the covenants and conditions contained in the lease, and to indemnify the assignor from and against all claims and demands on account of the same. The facts, so far as material, were as follows:—

By a lease of October 29, 1902, a house and shop, No. 162, Western Road, Brighton, were demised by one Broadbridge to the plaintiffs for a term of thirty years at the rent therein mentioned, with a covenant by the plaintiffs with the lessor that they would not at any time during the said term "make any alteration or addition whatsoever to the said premises"

without the previous approval in writing of the lessor first had and obtained.

The plaintiffs subsequently entered into negotiations with the defendants, who were already in possession of No. 161 and other houses in Western Road, for the sale of this lease to the defendants. One term of the negotiations was that the defendants should be at liberty to make a connection between No. 161 and No. 162 by means of openings on the ground and first floors; to this Broadbridge, the lessor, consented, and the transaction was carried out by three deeds of June 24, 1903. By one of these deeds the lessor formally consented to the proposed alterations.

By another deed the premises comprised in the lease of October 29, 1902, were assigned to the defendants for the unexpired residue of the said term of thirty years, subject to the rent reserved by, and the covenants and conditions contained in, the said lease, and the defendants thereby covenanted with the plaintiffs, in the usual form, during the residue of the said term to pay the said rent, and "to observe and perform the covenants and conditions therein" (i.e., in the lease) "contained, and which henceforth on the lessees' part ought to be observed and performed," and to indemnify the plaintiffs from and against all claims and demands on account of the same.

By the remaining deed the defendants covenanted with the plaintiffs to make the proposed openings in conformity with the plan therein referred to, and at the expiration of the term to close up the communications so made; and again covenanted "to observe and perform" the covenants in the lease, in identical terms.

The defendants, having entered into possession of No. 162, were advised that it was desirable for the convenient carrying on of their business, and for the better accommodation of their own servants and of customers, that they should rearrange the water-closet accommodation of No. 162, which was insufficient and insanitary; and they accordingly proceeded to construct further and more suitable accommodation on the first floor, and in carrying out this additional alteration they opened a new window in the eastern wall of the premises, and put in

WARRINGTON J.

1904

HARRIS v. BOOTS, CASH CHEMISTS (SOUTHERN), LIMITED.

the necessary soil and ventilating pipes, which also passed through this wall and remained exposed on its outer face.

As these further alterations had been made without the leave of the plaintiffs the present action was commenced, claiming a mandatory order on the defendants to remove these alterations, and to restore all such parts of the said messuage and premises as had been altered (otherwise than in accordance with the said agreed plan) to the condition in which the same were at the date of the execution of the deeds of June 24, 1903.

The action was tried with witnesses, and several other defences were raised on the evidence; but, having regard to the view taken by the Court on the question of law, namely, the plaintiffs' claim to an injunction as covenantees in the assignment of the lease, it is not necessary to make any reference to them, and the facts and arguments on this portion of the case are accordingly omitted.

Cave, K.C., and *Curtis Price*, for the plaintiffs. It is practically admitted that "an alteration" has been made in the demised premises for which no previous leave was obtained, and that the covenant in the lease has been broken. The lease contains a negative covenant not to alter the premises; the defendants covenanted with the plaintiffs to perform and observe this covenant, and the plaintiffs are therefore entitled to enforce specific performance of the negative covenant not to alter by injunction. A covenant to observe and perform a covenant not to alter without leave is equivalent to a covenant direct with the plaintiffs not to alter without leave.

Rowden, K.C., and *Maugham*, for the defendants. The only covenant on which the plaintiffs can sue the defendants is the covenant contained in the assignment of the lease, and that is an affirmative covenant to perform and observe certain covenants. A covenant of that kind will not warrant an action for an injunction; an injunction can only be obtained in the case of negative covenants. In the case of negative covenants the Court practically has no discretion but to grant specific performance of that negative bargain which the parties have

made between themselves: *Doherty* v. *Allman* (1); but that is not the case here. The covenant here follows the form invariably adopted in all assignments of leaseholds, and it is in effect nothing more than a covenant of indemnity, and indemnity only for breaches already committed, not general indemnity: *Lloyd* v. *Dimmack*. (2) The liability of the lessee is as surety for the assignee, and the covenant by the assignee is to indemnify the lessee against liability for breaches of covenant whilst he is assignee, and nothing more: *Moule* v. *Garrett*. (3) The lessor has taken no steps against the plaintiffs, and the plaintiffs have suffered no damage for which the defendants are liable. There appears to be no express decision on this point, but the observations of the Lords Justices in the case of *In re Poole and Clarke's Contract* (4) are very much in point, though that case related to the indemnity a vendor is entitled to obtain from his purchaser in respect to restrictive and other covenants on a sale of freeholds; so far, therefore, as the claim for a mandatory injunction is concerned, the plaintiffs have no right of action.

Cave, K.C., in reply. The plaintiffs are not suing for an indemnity; the covenant is a double one: the first portion of it is to perform and observe the covenants in the lease; the second portion is to indemnify the plaintiffs against any damage occasioned by a breach; it is on the first portion of this covenant that this action is founded. A lessee is not bound to stand by and see the demised premises altered or damaged because the lessor has taken no proceedings, and for that reason the covenant to perform and observe the covenants in the lease is inserted in order to enable the lessee to prevent his assignee from breaking the covenants. The effect of a covenant in this form is equivalent to a covenant over again by the assignee with the lessee in the words of the original covenants of the lease; it is an express covenant on which the lessee can sue, and one that can be enforced by injunction. *Moule* v. *Garrett* (3) and *Lloyd* v. *Dimmack* (2) were actions for indemnity. *In re Poole and Clarke's Contract* (4) was a

(1) (1878) 3 App. Cas. 709, 719.
(2) (1877) 7 Ch. D. 398.
(3) (1870) L. R. 5 Ex. 132.
(4) Ante, p. 173.

WARRINGTON J.
1904
HARRIS v. BOOTS, CASH CHEMISTS (SOUTHERN), LIMITED.

case of freeholds, and the Court there disclaimed any intention of interfering with the long-settled practice with regard to an assignment of leaseholds. In this case the plaintiffs are entitled to the protection of an injunction: *McEacharn* v. *Colton*. (1)

WARRINGTON J. This case, in the view I take of it, resolves itself into a simple question of law. [His Lordship having shortly stated the nature of the action and the material portions of the deeds and the facts as above, and having referred to the other defences raised on the evidence, on which he considered it was not now necessary to express any opinion, continued:—]

There remains only the one serious question of law, namely, whether the plaintiffs, who no longer have any interest in the premises, are entitled to require the defendants specifically to perform the negative covenant contained in the lease not to make any alteration without the lessor's consent. Now in considering that question, one must first see what is the position of the present plaintiffs in reference to the person who can enforce the covenant contained in the original lease—I mean the lessor. The lessor can clearly obtain no injunction against the plaintiffs, and that for two reasons. He cannot obtain an injunction restraining them from committing a breach of the negative covenant in future, because they have not committed a breach of it in the past. The breach has been committed by somebody over whom they have no control. He cannot obtain a mandatory injunction requiring the plaintiffs to restore the premises to their original condition, because the plaintiffs are not in possession and have no right to possession. The lessor, therefore, could not obtain an injunction against these plaintiffs in any form, and could not obtain specific performance of this covenant against them. On the other hand, he could obtain damages, if he had suffered any by the breach of this covenant.

The next point which one has to consider is what, under the circumstances and having regard to the relative position of the lessor and the original lessees after the assignment, is

(1) [1902] A. C. 104.

the true meaning and effect of the covenant contained in the assignment, because it is that covenant which is sued upon, and not the covenant contained in the original lease. I have read that covenant, which is in the usual form, and will not read it again; but it seems to me that, when you really consider what it is that in such a case the assignor is insisting upon, it is indemnity and indemnity alone. If I were to hold that the covenant is intended to require the assignee, as between himself and the original lessee, specifically to perform every covenant in the lease, I must go to this extent. I must say that it is quite immaterial whether the lessor objects, or whether he has even waived enforcing the covenant. In that view it is an independent covenant entered into by the assignee with the lessee, and I have nothing to do with anything else. Now it seems to me that I cannot so hold. I think the true object of the covenant entered into on the assignment of the lease is to indemnify and protect the original lessee against breaches of covenant contained in the lease under which he holds. Now there is admittedly no direct authority on this point; so far as the reports go, there is no reported case in which a lessee has sought to enforce by injunction, as against an assignee, a negative covenant contained in a lease. There is no authority whatever which will guide me in deciding this question, except an expression of opinion by Vaughan Williams L.J. in a very recent case in the Court of Appeal—an opinion which was concurred in by the other Lords Justices, Romer L.J. and Cozens-Hardy L.J. That case is the case of *In re Poole and Clarke's Contract* (1), which related to a sale of freeholds, which were subject to negative restrictive covenants which had been entered into by the vendor. It was a case between vendor and purchaser, and the vendor having entered into those covenants insisted that the purchaser should covenant with him to perform the covenants and to indemnify him against their breach—in other words, that the contract between them for sale and purchase entitled him without more to an independent covenant to perform the covenants on which the vendor was liable. Kekewich J.

(1) Ante, p. 173.

WARRINGTON J.
1904
HARRIS v. BOOTS, CASH CHEMISTS (SOUTHERN), LIMITED.

decided that the purchaser was only bound to covenant to indemnify the vendor from liability in respect of these restrictive covenants—in other words, that the real intent of the parties in entering into the contract for sale and purchase was that the vendor should be indemnified. The matter went to the Court of Appeal on the appeal of the vendor, and the Court of Appeal came to the conclusion that Kekewich J. was right in the view he took of the effect of the contract of sale and purchase, because while inserting the covenant that the purchaser would perform and observe the covenants and conditions for which the vendor was liable, which Kekewich J. had refused the vendor, they qualified it by a prefatory statement that such covenant was inserted "with the object and intention of affording to the vendor, his heirs, executors, and administrators, a full and sufficient indemnity in respect of the restrictive covenants, but not further or otherwise." The actual decision (quite independent of the dictum to which I am about to refer) in that case, therefore, was that in the case of a sale and purchase of freeholds, the contract imports an obligation on the part of the purchaser to indemnify and to indemnify only. Now, when that had been settled, Vaughan Williams L.J. expressed an opinion in reference to the nature of the contract on the sale of leasehold property, which of course is the case with which I have to deal, and he expressed his opinion in these terms (1): "I wish to add that the practice of conveyancers with regard to the covenant to be entered into by an assignee of leaseholds must stand unaltered, and there is nothing in our judgment which will render it necessary to introduce into the covenant any other words. But, in my opinion, even in that case the covenant ought to receive the same construction as if it had been prefaced with the words which we have suggested in the present case"; and that opinion was concurred in by Romer L.J. and Cozens-Hardy L.J. Now what does that mean? It seems to me that it means that a contract for the sale and purchase of leaseholds has exactly the same effect that the Court of Appeal had just held that it has in the case of

(1) Ante, p. 177.

freeholds, and that whether the actual covenant inserted in the assignment has the prefatory words which the Court of Appeal had inserted in the case before them or not, when you regard the circumstances under which the covenant was entered into, it is one of indemnity, and one of indemnity only.

Now I must apply that to the present case, and it seems to me that both the decision and the dictum of Vaughan Williams L.J. assist me in coming to the conclusion to which I come, which is that the plaintiffs are not entitled as of right, and as the covenantees in the assignment, to specifically enforce the negative covenant contained in the lease: they are entitled to an indemnity; and if the lessor sues the lessees for damages for the breach which has been committed by the assignees, the lessees have a right of indemnity against the assignees; but the covenant goes no further, and in my opinion there is at present no right of action. The lessor has not sued the lessees, and, so far as I can see, although he has in his letters called attention to the fact that the covenant has been broken and that his consent is necessary, I see no reason to suppose from those letters that he proposes to sue the lessees either for an injunction, which would fail, or for damages.

Now it has been contended further that in reality this is not a negative covenant at all; and there is a great deal to be said for that contention. If I were driven to it, I should come to the conclusion that it is not a negative covenant within the strict rule which binds the Court to grant an injunction where a negative covenant has clearly been broken. It seems to me there is considerable difference between the case where, on a sale of property or on a lease, the vendor or the lessor takes from the purchaser, or the lessee, a covenant that a certain thing will not be done, and the case where, on a similar transaction, all that he insists upon is a covenant that certain other covenants shall be performed. I will illustrate that as I did in the course of Mr. Cave's argument. If in the present case, instead of taking that which I have construed to be a contract of indemnity, the lessees had chosen to insist, and the assignees had chosen to comply with his demand, that

WARRINGTON J.

1904

HARRIS v. BOOTS, CASH CHEMISTS (SOUTHERN), LIMITED.

there should be inserted in this assignment covenants in express terms the same as those contained in the original lease, then there would have been a negative covenant entered into by the assignees with the lessees, and I do not think the Court would have been at liberty to consider what were the motives of the parties in entering into this covenant; there would have been then a negative covenant, and if it had been broken the plaintiffs would have been entitled to an injunction; but it seems to me (and I rather think it is logically repeating the same point which I have already decided) there is a considerable difference between the two cases, and it may be, as I have said, merely because the second case is one in which the lessees take merely a covenant for indemnity. Whether that be so or not, the covenant in the present case is, in terms, an affirmative covenant, and I think that that fact does distinguish it from the cases in which it has been held the Court has no discretion, but must enforce by way of injunction specific performance of a negative covenant.

On the whole I come to the conclusion, therefore, that the action fails, and there must be judgment for the defendants with costs.

Solicitors: *Nye, Moreton & Clowes, for J. K. Nye & Treacher, Brighton; Tyrrel Lewis, Lewis & Broadbent.*

W. C. D.

In re DALLAS. (1)

[1903 D. 083.]

C. A.
1903
BUCKLEY J.
Dec. 16, 17, 18.
C. A.
1904
Feb. 10, 11

Mortgage—Incumbrances—Personal Estate—Charges on Expectancy—Notice—Priority — Assignor Executor — Renunciation by Executor — Notice to Executor—Notice to Person having Legal Dominion of Fund — Fund without Trustee—Administrator, Subsequent Notice to.

In 1897 D. charged his expectant interest in a legacy bequeathed to him by the will of his father, who was then living, in favour of S., and in 1898 he charged it in favour of B. The father died in 1902, D. being named his sole executor. In January, 1903, D., who had never acted as executor, renounced probate, and on March 4 administration, with the will annexed, was granted to his sister. On the following day B. gave notice to the administratrix of his charge. On March 12 S., who then became aware for the first time of the grant of administration, gave the administratrix notice of his charge. Subsequently the legacy, which had been in court, was paid out to the administratrix :—

Held, by the Court of Appeal, that, although S.'s delay in giving notice to the administratrix was not due to any negligence on his part, yet, applying the rule in *Dearle* v. *Hall*, (1828) 3 Russ. 1 ; 27 R. R. 1, recognised in *Ward* v. *Duncombe*, [1893] A. C. 369, B. was entitled to priority through his having been the first to give notice to the administratrix as being the first person having legal dominion of the fund after it had come into existence by the death of the testator :

Held, further, that the case was governed by *Johnstone* v. *Cox*, (1880) 16 Ch. D. 571 ; (1881) 19 Ch. D. 17, and that the circumstance that on the death of the testator, when the fund charged came into existence, there was no trustee or other person having the legal dominion of the fund to whom effective notice could be given, was immaterial to alter the priority obtained by notice given to the person who subsequently had such legal dominion.

Notice given by an assignee of a fund to the person who is himself the assignor is not an effectual notice so as to alter priorities : *Browne* v. *Savage*, (1859) 4 Drew. 635.

Semble, notice given by an incumbrancer to an executor who afterwards renounces without having in any way acted in the office is invalid.

Decision of Buckley J. affirmed.

ROBERT DALLAS, by his will dated July 7, 1893, bequeathed the sum of 10,000*l.* to his son Frederick Dallas, whom he appointed executor and trustee, together with two other persons who predeceased the testator.

(1) This report has been unavoidably delayed by the reporter's illness.—F. P.

C. A. 1904 DALLAS, *In re.*

At the date of the testator's death his estate was under the protection of an order in Lunacy dated June 28, 1898, and consisted of funds either standing in court in the lunacy, or under the control of the Court in the hands of a receiver appointed in the lunacy.

The testator died on December 24, 1902, and on January 9, 1903, Frederick Dallas, the only surviving executor named in the will, renounced probate of the will and by deed disclaimed the trusts thereof.

On March 4, 1903, letters of administration, with the will annexed, of the testator's personal estate were granted to his daughter, Mrs. Emily Beedell, widow, and by an order of March 27, 1903, the whole of the funds in court were, on May 4, 1903, paid out to her. She thereupon paid the testator's debts, funeral and testamentary expenses, and also the estate duty.

On May 12, 1903, Frederick Dallas was adjudicated bankrupt upon a petition which had been presented on February 24.

Between the dates of the will and the death of his father, F. Dallas, having become aware of the bequest to him of the 10,000*l.* legacy, executed numerous charges upon his expectations. He also executed two charges after the testator's death, one in 1902 and the other in 1903. As the total amount due upon the charges (which were thirty in number) far exceeded the amount of the legacy, questions of priority arose, which led to Mrs. Beedell, on May 28, 1903, paying the legacy into court under the Trustee Act, 1893. Those questions then came before the Court upon a petition presented by certain of the incumbrancers who claimed to be entitled to the fund in court representing the 10,000*l.* legacy in priority to the others, the circumstances being as follows.

It appeared that the will had been prepared by Messrs. Brooks, Jenkins & Co., the testator's solicitors, who also acted for the surviving executor, F. Dallas, in his renunciation and disclaimer, and for his sister, Mrs. Beedell, upon her taking out administration.

By a mortgage dated January 13, 1894, a charge dated March 30, 1896, and a consolidation mortgage dated Decem-

ber 7, 1896, F. Dallas charged his expectant legacy in favour of Edgar Francis Jenkins, a member of the firm of Brooks, Jenkins & Co., as security for 1900*l.* and compound interest.

By a deed of January 8, 1897, F. Dallas charged his expectant legacy, together with a policy, in favour of the British Empire Mutual Life Assurance Company to secure 2800*l.* and interest. This charge was prepared by Messrs. Brooks, Jenkins & Co., who were the company's solicitors.

By a deed of June 15, 1898, F. Dallas charged his expectant legacy in favour of Stanley Herbert Scott and Arthur Edward Heatley, who then constituted the firm of Brooks, Jenkins & Co., as security for 1000*l.* and interest.

On January 9, 1903, immediately after the renunciation and disclaimer, Messrs. Brooks, Jenkins & Co. gave formal notice in writing of the several above-mentioned charges (hereinafter referred to as "the Brooks-Jenkins incumbrances") to Mrs. Beedell, and on March 5, 1903, the day after the grant to her of the letters of administration, they again gave her formal notice of those charges. These notices to Mrs. Beedell were repeated upon her obtaining the order in Lunacy for payment out of the funds in court to her, and again on May 4, 1903, immediately after the actual payment out to her.

Among other charges executed by F. Dallas were three created by deeds of May 18 and October 7, 1897, and November 3, 1898, in favour of Frederick Stuart as security, together with certain life policies, for sums amounting in all to 5700*l.* and interest. Before executing the deed of May 18, 1897, F. Dallas handed to F. Stuart a written declaration that the charges he had already given on his interest did not amount to more than 4500*l.*

It was not until March 12, 1903, that it came to F. Stuart's knowledge that letters of administration had been granted to Mrs. Beedell, and thereupon, on the same day, he gave Messrs. Brooks, Jenkins & Co. notice by letter of his charges. Notices by several other incumbrancers were given between December 24, 1902, the date of the testator's death, and January 9, 1903, the date of F. Dallas's renunciation, to Messrs. Brooks, Jenkins & Co. as solicitors to F. Dallas.

C. A. 1904 DALLAS, *In re.*

In the circumstances above stated, the Brooks-Jenkins incumbrancers claimed to have priority over F. Stuart's charges, and also over all the other incumbrancers, on the ground of priority of notice; and they accordingly presented a petition asking for a declaration that they were entitled to payment in priority over all other incumbrances created by F. Dallas on the fund in court representing his legacy; that as between the petitioners themselves their incumbrances ranked in order of date; and for the necessary accounts and inquiries.

The petition was served upon the administratrix, Mrs. Beedell, and upon all the other incumbrancers, including F. Stuart.

The total amount claimed to be due on the Brooks-Jenkins incumbrances was 7081*l.*, and the amount claimed to be due on F. Stuart's incumbrances was about 7000*l.*

The petition came before Byrne J. on July 4, 1903, when his Lordship made an order directing inquiries as to the incumbrances and their priorities, and an account of what was due on the several incumbrances. In the course of those inquiries before the master various points of law arose which he said must be determined before he could settle his certificate, and he accordingly referred those points of law to the judge. Thereupon, in order to have these points decided, the petitioners took out a summons which was, in form, simply one to proceed upon the order directing inquiries.

G. I. F. C.

The summons was heard before Buckley J. on December 16 and 17, 1903.

Buckmaster, K.C., and *Romer Macklin*, for the petitioners, except the insurance company. The question is whether any notice of incumbrance was required, and, if so, at what date, having regard to the incumbrances having commenced while the legacy was only prospective, effective notice could be given.

Notice of an incumbrance was necessary; it could not be effectual unless given to a person holding the fund in the capacity of a trustee; and notice to a solicitor is ineffectual

unless he has been expressly directed by his client to receive notices.

What was charged in the present case was a mere expectancy. As in the case where book debts are the subject of the charge, the contract binds the conscience of the person giving the charge, who, on the property coming into tangible existence, cannot deny the charge given to the chargee, and on the death of the testator the charge attaches: *Tailby* v. *Official Receiver* (1); *In re Clarke.* (2) But notice must, in the case of a charge on an equitable chose in action, be given to the person entitled to hold the fund; and that it is not sufficient to give notice to a person who is not at the time entitled to hold the fund, but afterwards becomes so entitled, is shewn by *Johnstone* v. *Cox* (3) and other cases relating to charges on commissions in the army, and by *Lloyd* v. *Banks.* (4) The person whose receipt of notice effectuates the chargee's title must be one who is under some obligation to deal with the fund: *Addison* v. *Cox.* (5)

Acceptance by solicitors on behalf of trustees is not sufficient in the absence of express authority from the trustees: *Saffron Walden Second Benefit Building Society* v. *Rayner.* (6)

The petitioners, having been the first to give notice to the administratrix after she became clothed with that office, are entitled to stand first.

Astbury, K.C., and *Gatey*, for the British Empire Mutual Life Assurance Company. The company is in the same position as the other petitioners, except that the dates of its charges are earlier. It has, therefore, priority over the other petitioners.

L. Ryland, for the Staffordshire Financial Company, an incumbrancer whose charge was dated in 1900, and whose notices were given to the administratrix by their solicitors, Messrs. Brooks, Jenkins & Co., on the same dates as the notices by the petitioners.

We are in the same position as the petitioners, for their

(1) (1888) 13 App. Cas. 523.
(2) (1887) 36 Ch. D. 348.
(3) 19 Ch. D. 17.
(4) (1868) L. R. 3 Ch. 488.
(5) (1872) L. R. 8 Ch. 76, 79.
(6) (1880) 14 Ch. D. 406.

C. A. 1904 DALLAS, *In re.*

notices were given on behalf of this company as well as on their own behalf.

H. Terrell, K.C., and *P. S. Stokes*, for Frederick Stuart. The question of priority in this case does not depend upon notice. It is not contested that what has been charged is sufficiently identified to be within the rule laid down in *Holroyd* v. *Marshall*. (1) The assignment binds the assignor's conscience when the subject-matter comes into existence, and a person cannot be bound to give notice when no one exists to whom he can give it. A prior incumbrancer is not displaced by a subsequent incumbrancer unless there is some equity preventing the former from insisting on his priority: *Ward* v. *Duncombe*. (2) The critical moment is the time of taking the second charge: *In re Wyatt* (3), and unless there has been negligence on the part of, or some equity against, the earlier incumbrancer, his title must prevail: *Dearle* v. *Hall* (4); *Ward* v. *Duncombe*. (2)

The army commission cases, besides *Johnstone* v. *Cox* (5), are *Buller* v. *Plunkett* (6), *Webster* v. *Webster* (7), *Somerset* v. *Cox* (8), *Yates* v. *Cox* (9), and *Calisher* v. *Forbes*. (10) Only *Yates* v. *Cox* (9) can be shewn to lay down any principle applicable here—namely, that the notice itself being necessary to complete the title, itself created the charge—and that is inconsistent with *Tailby* v. *Official Receiver* (11), which shews that the assignee's title is complete as soon as the chose in action comes into being.

But if the army commission cases do now apply, they shew that notice had to be given to the army agent the moment the money derivable from the commission reached him, and that if it reached him before the *Gazette* notice appeared, as the officer's title had not until then commenced, the prior notice was useless. In the case of a testator's death previous notice is useless.

(1) (1862) 10 H. L. C. 191.
(2) [1893] A. C. 369.
(3) [1892] 1 Ch. 188, 207.
(4) 3 Russ. 1, 12; 27 R. R. 1.
(5) 19 Ch. D. 17.
(6) (1860) 1 J. & H. 441.
(7) (1862) 31 Beav. 393.
(8) (1865) 33 Beav. 634.
(9) (1868) 17 W. R. 20.
(10) (1871) L. R. 7 Ch. 109.
(11) 13 App. Cas. 523.

A. Adams, for Joseph Chapman, an incumbrancer whose charge was dated in 1899, and who had given notice to Messrs. Brooks, Jenkins & Co. on January 1, 1903, and to the administratrix on January 31 and May 11, 1903.

My client claims priority over Stuart, whose notice was subsequent; and also priority over persons having incumbrances subsequent in date to his own, because his notice before administration was sufficient for preserving if not for acquiring priority.

Notice to a person who is not a trustee when he receives it, but who shortly afterwards becomes a trustee, is sufficient: *Lloyd* v. *Banks* (1); *Meux* v. *Bell* (2); *Arden* v. *Arden*. (3)

Dearle v. *Hall* (4) only shews that a prior notice is effectual in favour of a subsequent incumbrancer where the trustee is at the time ignorant of the existence of the prior incumbrance: *Ward* v. *Duncombe*. (5) Having regard to the information of the administratrix in the present case, subsequent incumbrancers could not obtain priority.

P. F. Wheeler, for John Edwards, an incumbrancer whose charge was dated January 23, 1901, and who had given notice on February 5, 1901, to Messrs. Brooks, Jenkins & Co., who were solicitors to the receiver, and were afterwards solicitors to the administratrix.

It is submitted that, there being no evidence as to when the solicitors communicated their information to the administratrix, an inquiry on this point should be directed.

H. W. Vaughan Williams, for A. M. Kettlewell, an incumbrancer whose incumbrance was the first created in 1902 after the testator's death, and who had given notice of it to Messrs. Brooks, Jenkins & Co., on January 28 and May 8, 1903.

As the person creating this incumbrance was also executor there was no need to give him notice: *In re Wasdale*. (6) The fund on the testator's death vested in the executor: *Smith* v. *Milles*. (7) The subsequent renunciation of the executor did

(1) L. R. 3 Ch. 488.
(2) (1841) 1 Hare, 73, 84; 58 R. R. 41.
(3) (1885) 29 Ch. D. 702, 708.
(4) 3 Russ. 1; 27 R. R. 1.
(5) [1893] A. C. 369.
(6) [1899] 1 Ch. 163.
(7) (1786) 1 T. R. 475.

C. A. 1904 DALLAS, *In re.*

not affect the result. As shewn by the army commission cases, notices before the testator's death are useless: *Somerset* v. *Cox*. (1)

[BUCKLEY J. referred to *Roxburghe* v. *Cox*. (2)]

W. H. Cozens-Hardy, for Herbert Attenborough, an incumbrancer whose charge was dated in 1901, and who gave notice to the administratrix directly after the fund passed into her hands from the control of the Lunacy jurisdiction.

No notice previous to ours was effectual: *Mutual Life Assurance Society* v. *Langley*. (3)

Hugo Marshall, for John E. Evans, an incumbrancer whose charge was dated April 28, 1898, and whose only notice was one given to Messrs. Brooks, Jenkins & Co., on January 1, 1903.

Messrs. Brooks, Jenkins & Co. cannot obtain priority over Evans for their charge of June 15, 1898, for he gave them notice when they were acting as solicitors for the executor.

Buckmaster, K.C., in reply. *Tailby* v. *Official Receiver* (4) has nothing to do with notice: *In re Wallis*. (5) The army commission cases were rightly decided: *Boss* v. *Hopkinson*. (6) The fact that the legatee was executor does not help those who gave notice to him any more than those of whose charges he was only aware, he having renounced probate: Williams on Executors, 9th ed. vol. i. p. 233; Probate Act, 1857, s. 79; Probate Act, 1858, s. 19. [He also referred to *Browne* v. *Savage* (7); *Foster* v. *Cockerell*. (8)]

Cur. adv. vult.

1903. Dec. 18. BUCKLEY J., after stating the facts, proceeded:—The points of law which arise are as to the priorities of the incumbrancers having regard to the various notices which they gave, if notice is necessary for the purpose of determining the priorities under the circumstances which I have stated.

(1) 33 Beav. 634.
(2) (1881) 17 Ch. D. 520.
(3) (1886) 32 Ch. D. 460, 473.
(4) 13 App. Cas. 523.
(5) [1902] 1 K. B. 719.
(6) (1870) 18 W. R. 725.
(7) 4 Drew. 635, 640.
(8) (1835) 3 Cl. & F. 456; 39 R. R. 24.

The notices may be grouped under several classes. First, notices given between December 24, 1902, the date of the death of Robert Dallas, and January 9, 1903, the date on which Frederick Dallas renounced, to a firm of Messrs. Brooks, Jenkins & Co., solicitors, who at that date were not solicitors for any person who could be described as the legal holder of the fund. No one contends that these notices were effectual. Secondly, notices given by Messrs. Brooks, Jenkins & Co., on behalf of certain clients, to Mrs. Beedell before March 4, 1903, when she obtained administration. Thirdly, notices given by Messrs. Brooks, Jenkins & Co. to Mrs. Beedell immediately after she obtained administration, that is to say, on the next day, March 5, 1903. Lastly, if that has to be considered, a notice given to the administratrix immediately after the date in May when the funds in fact reached her hands out of the jurisdiction in Lunacy. The questions I have to determine on the arguments which have been addressed to me seem now to be two, namely, first, whether notice is necessary at all; and, secondly, if it be necessary, then at what time and to whom the notice should be given.

Between the date of the will in 1893 and of the death in 1902, Frederick Dallas of course had no property at all as regards this legacy. He had merely a possibility or expectancy, if the testator died without revoking his will, that he would be entitled (an event which happened), but he had no property at all. That an equitable incumbrance may be given upon a mere possibility or expectancy or upon future property, of course, is well settled. I read from the judgment of Cotton L.J. in *In re Clarke* (1) what he says as to the ground upon which that rests. His Lordship says: "It is clear that an assignment cannot at law pass future property, but it may be made effectual against future property on the ground that a Court of Equity will in a suitable case enforce it as a contract." I read also the well-known sentence in Lord Macnaghten's judgment in *Tailby* v. *Official Receiver* (2): "It has long been settled that future property, possibilities and expectancies are assignable in equity for value. The mode or form of assignment is

(1) 36 Ch. D. 348, 351. (2) 13 App. Cas. 523, 543.

C. A. 1904 DALLAS, *In re.* Buckley J.

absolutely immaterial provided the intention of the parties is clear. To effectuate the intention an assignment for value, in terms present and immediate, has always been regarded in equity as a contract binding on the conscience of the assignor and so binding the subject-matter of the contract when it comes into existence, if it is of such a nature and so described as to be capable of being ascertained and identified." That proposition, I need scarcely say, has not been contested at the bar. When you are dealing with a property such as this it is, of course, obvious that there is no legal holder of the fund, and that it is impossible to give notice to anybody. There is a considerable body of cases relating to property of this description, which arose in the old days before purchase in the army was abolished. An officer's commission was not his property which he could bind in any way, but it was something which, by virtue of the system which prevailed as to purchase, might in a contingent event be represented by money, and there was an expectancy or a possibility of a fund coming to him if he was gazetted out of the army. What happened in these cases was this. The money in question was paid into the name of the officer's army agents, and became the property of the officer at the moment when his retirement was gazetted. Down to that moment he had nothing at all beyond the expectancy to which I have referred. Perhaps I had better mention the names of the cases. There are eight of them: *Buller* v. *Plunkett* (1), *Yates* v. *Cox* (2), *Boss* v. *Hopkinson* (3), *Somerset* v. *Cox* (4), *Calisher* v. *Forbes* (5), *Addison* v. *Cox* (6), *Johnstone* v. *Cox* (7), and *Roxburghe* v. *Cox*. (8) In all those cases what was decided was this: Until the moment at which the fund in the army agent's hands became, by the gazetting of the officer's retirement, his property, there was no fund of which there was any legal holder at all. It became his on the gazetting, with the result that the notices given to the army agents before the gazetting were

(1) 1 J. & H. 441.
(2) 17 W. R. 20.
(3) 18 W. R. 725.
(4) 33 Beav. 634.
(5) L. R. 7 Ch. 109.
(6) L. R. 8 Ch. 76.
(7) 16 Ch. D. 571; affirmed 19 Ch. D. 17.
(8) 17 Ch. D. 520.

perfectly useless and idle. It was not open to any one to say that the army agent, when the *Gazette* appeared, ought to have remembered the notice he had received the previous day or the previous week. The previous notice was void altogether, because it was not given to a person who was the legal holder of the fund. But immediately upon the appearance of the *Gazette* the equitable incumbrancers, if they were wise, took care to serve the army agents with notice. The rule was that all notices received on the same day ranked pari passu as regards notice, and inter se took priority according to priority of date of the incumbrance. To such a length was the refinement carried that, if a notice was served after office hours on the day next preceding that on which the notice in the *Gazette* appeared, that was treated as good notice on the day the *Gazette* appeared, because it was assumed that the parties who received it would open it the next morning; but if it arrived the previous day, during office hours, it was a bad notice and ineffectual. From those cases it is obvious that two results follow—that where the subject of the equitable incumbrance is an expectancy or possibility, notice is necessary, and that priority goes according to the date of the receipt of the notice, or as between notices of even date, according to the priority of the date of the charge. There is no distinction between such a case as that and such a case as this. During the time that the testator was alive Frederick Dallas enjoyed in respect of his legacy the prospect of having a sum of money if something happened, as did the officer in the case I have referred to.

For the respondents I have heard an argument which is certainly not deficient in courage. I am told that all those cases as to officers' commissions are wrong, and that they are wrong because of two recent decisions in the House of Lords (in which those cases were not referred to or commented on or dealt with), which have laid down principles which are inconsistent with the principles upon which those cases were decided. Amongst the learned judges who decided the earlier cases are found Sir William Page Wood, James L.J., Mellish L.J., Sir George Jessel, and Lord Selborne—a formidable array of names. Let me deal with the two cases upon the authority of

C. A. 1904 DALLAS, *In re.* Buckley J.

which it is now said that I am bound to hold that the cases as to officers' commissions are all wrong. The first of those is *Tailby* v. *Official Receiver* (1), to which I referred just now. Let me recall what the facts of that case were. Tailby was the assignee of a book debt due from the firm of Wilson Brothers & Co. He gave notice to the debtors. Subsequently the assignor became bankrupt. After the adjudication the debtors paid Tailby, and the official receiver sued Tailby in the county court for the amount of the debt. After many vicissitudes, in which every Court in succession reversed the Court immediately preceding it, the official receiver failed in the House of Lords. The only question decided in *Tailby* v. *Official Receiver* (1) was whether the property which was there referred to was so sufficiently identified as to be within the principle of *Holroyd* v. *Marshall.* (2) The question before me did not arise in that case in any way whatever, and the House of Lords said nothing about it. I think I have said enough to shew that *Tailby* v. *Official Receiver* (1) has nothing to do with it.

The other case is *Ward* v. *Duncombe.* (3) When the judgments in that case are read, I think it will be found that what was there established was, first, that the doctrine of notice rests upon the principle that the equitable assignee ought to take such steps as will prevent the assignor from retaining the apparent ownership of the fund; and, secondly (if it be a different proposition, although I think it is only an application of the former one), that he must take such steps as will give him a right in rem against the fund as distinguished from a right against the conscience of the assignor of the fund, and that that ought to be done by his taking possession of the fund to some extent—not necessarily to the full extent, but so far as possible. *Dearle* v. *Hall* (4) is a case which has been very often criticized, and it is keenly criticized by Lord Macnaghten in *Ward* v. *Duncombe* (5); but *Dearle* v. *Hall* (4) is indisputable law, although many judges have said that they

(1) 13 App. Cas. 523.
(2) 10 H. L. C. 191.
(3) [1893] A. C. 369.
(4) 3 Russ. 1; 27 R. R. 1.
(5) [1893] A. C. 384.

will not extend it. *Ward* v. *Duncombe* (1) has, it seems to me, left wholly untouched the doctrine of notice to "perfect" or "complete" or "establish"—whatever the right word may be—the title of the equitable assignee. Whether it has left it as resting so much as it was supposed to rest upon a doctrine of negligence I am not clear; but the principles which *Ward* v. *Duncombe* (1) enunciate are those which I have endeavoured to express. If that be the whole effect of *Ward* v. *Duncombe* (1), and I think it is the whole effect, how does that touch in any way the doctrine of the earlier cases as regards an equitable assignment of a possibility? I do not see that it touches it at all. The argument presented to me has been largely this: "At the moment when the equitable incumbrance was given, the equitable incumbrancer could not give notice to the legal holder of the fund, because there was no fund and no legal holder, ergo, he need never give notice to the holder of the fund." It is sufficient to reply that the proposition is in direct contravention of all that is decided in the earlier cases, and they are wholly untouched by anything which is decided in the House of Lords in *Ward* v. *Duncombe* (1), and are decisions which are binding on me. To put the argument which has been addressed to me on behalf of the respondents in a slightly different form, it comes to this—that the equitable incumbrance upon an expectancy is only a thing which binds the conscience of the assignor, and that through the conscience of the assignor no one can get more than the assignor justly can give him; or, secondly, that at the date of the incumbrance there was no legal holder of the fund, and no notice therefore could be given to the legal holder at that time, ergo, no notice need be given at any time. For that last proposition a sentence in particular was referred to in *In re Wyatt* (2), the case which was affirmed in the House of Lords under the name of *Ward* v. *Duncombe*. (1) The passage referred to is reported in [1892] 1 Ch. 207, and runs thus: "The time of the taking of the subsequent charge, or, more exactly, the time when inquiry was or ought to be made of the trustees, and not the period of distribution, thus

(1) [1893] A. C. 369. (2) [1892] 1 Ch. 188.

C. A. 1904 DALLAS, *In re.* Buckley J.

appears to be the critical moment." The argument which is rested upon that sentence is not, I think, a bad illustration of the fallacies into which you may fall if you allow yourself to read a sentence divorced from the context and divorced from the circumstances under which the language is used. That language was used without reference in any way to such a point as I am considering here, but with reference to a case where one of two trustees had notice of a settlement made by a beneficiary of her share in a fund. That trustee died, and a new trustee was appointed in his place. The new trustee and surviving original trustee knowing nothing of the settlement, the question was whether a person who subsequently obtained a charge and gave notice to those trustees was entitled to say, "The trustee who had notice of the prior incumbrance is dead; the doctrine of notice does not apply against me." It was held that he was not entitled to say so. Directly you see that those are the circumstances under which the language was used, it becomes apparent that it is not applicable at all to the case which is before me. The case here is that down to the death there is no legal holder, but after the death there is a legal holder, and the question is, Is not the only efficient notice a notice to the legal holder when there is a legal holder? Upon that question the earlier cases, of course, are directly in point. The equitable assignee who in the case of the officer's commission gave his notice did, through the conscience of his assignor, get more than his assignor could properly have given him, because he stepped in with the notice and thus acquired priority. I therefore hold that notice in the present case is necessary.

I pass on to consider what notice must be given, and to whom. As regards the person to whom notice must be given, I will refer to a sentence in Lord Selborne's judgment in one of the earlier cases (*Addison* v. *Cox* (1)), from which it appears that it must be a notice given to a person who is "bound by some contract or obligation, existing at the time when the notice reaches him, to receive and to pay over, or to pay over, if he has previously received, the fund." That was the whole

(1) L. R. 8 Ch. 76, 79.

substratum of the earlier cases: that the notice given to the agent, when he was not bound by any contract or obligation, was altogether futile and useless. The only notice effectual was that which was given when, by the gazetting of the officer out of the army, the army agent became the trustee for him. The notice, therefore, must be given to a person bound by some contract or obligation. Next, the notice, if acquired in fact by the legal holder of the fund, is operative, even though it be obtained, not by direct notice from the incumbrancer, but under such circumstances as that, as a matter of business, the owner of the fund would be taken to have known it. I read this from Lord Cairns' judgment in *Lloyd* v. *Banks* (1): "If it can be shewn that in any way the trustee has got knowledge of that kind—knowledge which would operate upon the mind of any rational man, or man of business, and make him act with reference to the knowledge he has so acquired—then I think the end is attained, and that there has been fixed upon the conscience of the trustee, and through that upon the trust fund, a security against its being parted with in any way that would be inconsistent with the incumbrance which has been created." Further, suppose there are several trustees, notice to one of their number will be sufficient if he be not a trustee standing in such a position that it is his interest to conceal the notice, and this is none the less true because the question arises after that one who has received the notice is dead, and when the survivor and the new trustee have no knowledge. It was decided in *In re Wyatt* (2)—in the House of Lords *Ward* v. *Duncombe* (3)—that an effective notice is not displaced by any change of the trustees; so that if notice be given, say, to all of the trustees, and they all cease to be trustees, and three other persons become trustees who have no notice, the original notice is good (see also *In re Wasdale* (4), decided by Stirling J.). But this last proposition is, it may be, subject to exception in the case which arose in *Timson* v. *Ramsbottom* (5), upon which

(1) L. R. 3 Ch. 488, 491.
(2) [1892] 1 Ch. 188.
(3) [1893] A. C. 369.
(4) [1899] 1 Ch. 163.
(5) (1836) 2 Keen, 35; 44 R. R. 183.

C. A. 1904 DALLAS, *In re.* Buckley J.

Lord Herschell commented in *Ward* v. *Duncombe.* (1) If, however the assignor be himself one of the trustees, and he is the only person who receives notice, then, according to *Browne* v. *Savage* (2), notice to him will not be sufficient. In *Browne* v. *Savage* (3) Kindersley V.-C. says: "In the case where the assignor is himself one of the trustees, he being the only one of the trustees who has any notice or knowledge of the assignment which he has made, if he should afterwards apply to another person to advance him a sum of money on an assignment of his interest, concealing the fact of the prior assignment, such proposed assignee could not, by any caution in making inquiry of all the trustees, discover the fact of the prior assignment; for it is the interest of the trustee, who is the proposed assignor, to conceal the prior assignment; and the other trustees know nothing about it." I pass on to consider who were the persons who had notice and who were the persons who ought to have had notice on the facts of the case before me. Now the first proposition which it will be necessary to deal with is this. Frederick Dallas, the sole surviving executor, being himself the assignor, and of course knowing of all his own assignments, was he, when the testator died, a legal holder of the fund so that his knowledge operated in favour of all the equitable assignees as being, within *Lloyd* v. *Banks* (4), knowledge which he had which would be effectual? The first question to deal with upon this is, What was the effect of Frederick's renunciation? Sect 79 of the statute 20 & 21 Vict. c. 77, and s. 16 of 21 & 22 Vict. c. 95 are sections which deal, as regards the former with the case of renunciation, and as regards the latter with the case of death of the executor, or failure of the executor to appear and take probate when cited. As regards renunciation, in the case before me the statute provides that where a person renounces, "the rights of such person in respect of the executorship shall wholly cease, and the representation to the testator and the administration of his effects shall and may, without any further renunciation, go, devolve, and be committed in like manner

(1) [1893] A. C. 381.
(2) 4 Drew. 635.
(3) 4 Drew. 640.
(4) L. R. 3 Ch. 488.

as if such person had not been appointed executor." Upon that first ground, as it seems to me, the executor who subsequently renounced, as the result of the renunciation stood from the first in such a position as that he was not for this purpose a legal holder of the fund. Leaving the statute and regarding the case upon general grounds, according to *Ward* v. *Duncombe* (1) what you have to do is to give a notice to the person who has the disposal of the fund. You serve the legal holder because it is he who holds the purse-strings and keeps the money. Now it seems to me the executor who renounced never was a person who had the disposal of the fund. He could not have had the disposal of the fund except by intermeddling with the estate. If he intermeddles with the estate he cannot renounce. He therefore is a person who never had the disposition, and therefore is not the person to whom the notice ought to be given. Suppose the sole executor who had not proved was served with a notice, would it be his duty, when administration was subsequently granted to somebody else, to hand on that notice to the person who would then be legal holder of the fund, and would that have a retrospective operation as if it had been served on the date of the renunciation by the renouncing executor? I think not. The renouncing executor owes no duty to the estate. His position is this—that the testator has by his will nominated him to an office, and the tenure of that office no doubt comes to the executor, not by virtue of the probate, but by virtue of the will; but he is not bound to take the office. The testator cannot impose it upon him against his will, and if he refuses to take it then he is a person who refuses to have anything to do with the estate, and he then cannot be a person who owes to the estate the duty of handing on to a legal personal representative, when subsequently constituted, notices which in his hands were nothing at all. Again, apart from those grounds altogether, what was Frederick's position? He was sole surviving executor and assignor. Suppose that a notice to him under any circumstances could be effectual—I mean as being a service on a legal holder of a fund—this question then arises: Where

(1) [1893] A. C. 369.

C. A. 1904 DALLAS, *In re.* Buckley J.

the sole legal holder is also the equitable assignor, is the knowledge which he necessarily possesses a knowledge which enures for the benefit of the equitable incumbrancer? It is but an application of the principle of *Browne* v. *Savage* (1) to say that that cannot be so.

Browne v. *Savage* (1) lays down that if you give notice to one of several trustees, he being himself the assignor, that will not avail. On all these grounds it seems to me that although Frederick had knowledge, the fact that he had knowledge was not notice for the purpose of protecting the equitable incumbrancer. Then, if he was not the person, who was the person to whom the notice could be given? The answer is easy. There came into existence for the first time a legal holder of this fund when on March 4, 1903, administration, with the will annexed, was granted to Mrs. Beedell. I am not suggesting that in the meantime there was no legal holder at all. The legal ownership must be somewhere, but it was not in Frederick. Whether it was in the Crown or the President of the Probate Division, as it would have been under the old law, I need not set myself to inquire. It was somewhere, no doubt, but it was not in Frederick. It was not in any person who was served with notice before March 4, 1903, when Mrs. Beedell took out administration. She was the legal holder, and she was, in my judgment, the only person on whom notice could effectually be served. Substantially that determines all the questions that have been argued before me; but I have to say a word or two with respect to some subsidiary arguments that have been addressed to me for the purpose of shewing that I have not overlooked them. In the first place, an argument was addressed to me by counsel for Joseph Chapman which was to this effect—that the notice to the administratrix after the administration does regulate the priorities except, so counsel said, that as against a person who has given notice before administration a subsequent incumbrancer in date cannot by notice to the administratrix obtain priority. I fail to see the argument in support of that proposition. I have looked into *Arden* v.

(1) 4 Drew. 635.

Arden (1) and *Lloyd* v. *Banks* (2), and I fail to see that they have any bearing on the question. In no case cited to me was a notice given to a person who was not a trustee, nor was there any question argued as to what the effect of that would be; and I am myself unable to appreciate how a notice given to a person who is not the legal holder can, upon the principle I have endeavoured to explain, have anything to do with it.

Another argument was advanced on behalf of an incumbrancer called John Edwards, whose charge was dated January 23, 1901, and who had given notice of it to the receiver on February 5, 1901—that is to say, during the testator's lifetime. Of course such a notice would be perfectly idle and of no good at all. But it was argued that if the administratrix, after she became such, heard of that previous notice given in 1901, that would be a good notice, and that there ought to be an inquiry to find out whether that was so. Again I fail to see any ground whatever for that argument. It has been decided over and over again that a trustee, being a person who is not a legal holder, can have no notice at all.

Another argument was that the first charge which was executed after the testator's death, and of which notice was given to the legal personal representative, took priority over the charges of everybody else. I fail to see any ground for that contention. With previous incumbrancers the question is whether they have so given notice as to entitle them to avail themselves of it. The last argument was this: that the fund did not actually reach the hands of the administratrix until after the order in Lunacy was made, and that until the fund reached her hands notice to her was ineffectual. That argument was based on a case of *Mutual Life Assurance Society* v. *Langley*. (3) The argument presented is that so long as the fund was in a Court of Lunacy, notice to the trustee, the legal holder, was not sufficient, and that a stop order ought to have been obtained. Now *Mutual Life Assurance Society* v. *Langley* (3) was a case in which a fund was in court in Chancery and the Court of Chancery had the execution of the

(1) 29 Ch. D. 702. (2) L. R. 3 Ch. 488.
(3) (1884) 26 Ch. D. 686; 32 Ch. D. 460.

C. A. 1904 DALLAS, *In re.* Buckley J.

trusts or the administration of the fund. Under those circumstances the Court may not incorrectly be described as standing in the position of the trustee. What was held was that where a fund is so in court notice to the trustee alone is not sufficient, but that you must get a stop order also. Of course the distinction between that case and the present case is obvious. The Court of Lunacy is not executing a trust or administering the estate in any way. The Court of Lunacy is only a custodian of the property of the person who is, by reason of his unsoundness of mind, unable to control it himself. The moment that person dies the basis of the jurisdiction in Lunacy has gone. The Court of Lunacy is in no sense a trustee in any way. I believe I have now travelled over the whole field, and it is a large one, of the numerous points raised and the authorities upon them. The result is that I come to the conclusion that the priorities will rank according to the date of the notice given to the administratrix after administration was granted. I will only add this. The respondents have argued, I will not say without reason, that in such circumstances it is very difficult for the equitable incumbrancers to protect themselves by notice. That is the difficulty which arose in the old cases of the army commission and purchase. It used to be the practice, I believe, to post a notice every day to the army agent in case by misfortune the fund should come in without the incumbrancers being informed of it. The incumbrancer had to take care to be first in the field, or as early as anybody else. It is said truly enough that, inasmuch as the fund was created or became the property of the officer by the gazetting, it was open to everybody to know it, and that everybody had the means of knowing it, and therefore could protect himself. It is said—I am not sure how far that is so—that in the case of the granting of letters of administration there is not the same facility of obtaining information. That may be so, but it appears to me it has nothing to do with the question of law which I have to decide. If it be the law, as I hold it is, that an equitable assignee of a possibility of future property can only secure himself in the enjoyment of his security by giving notice to the legal holder when there is one; he must meet

that difficulty as best he can. He may have to return to the old practice of posting a letter daily.

I declare that the priority of these incumbrancers will be according to the dates of the notices given by them to the administratrix after administration was granted, and that of course in the case of notices on the same day they will rank in priority of the respective charges.

C. A. 1904 DALLAS, *In re.* Buckley J.

The order, as drawn up, contained a declaration that in making the inquiries as to incumbrances and priorities directed by the order of July 4, 1903, the priorities should be determined by the respective dates upon which notices were served on Mrs. Beedell after the grant of administration to her; and that, as between incumbrances notices whereof were served on the same day on her after the said grant, the priorities of such incumbrances inter se should be determined by the respective dates of such incumbrances; and it was ordered that the inquiries and accounts directed by the said order of July 4, 1903, should be proceeded with upon the footing of the above declaration.

F. E.

From that order Frederick Stuart appealed. C. A.

The respondents to the appeal were the petitioners and also incumbrancers whose charges were all subsequent in date to Stuart's charge, but whose notices had been given to the administratrix some before and others after his notice.

The appeal was heard on February 10 and 11, 1904.

H. Terrell, K.C., and *P. S. Stokes*, for the appellant, Stuart. We submit that Stuart is entitled in priority to Messrs. Scott & Heatley (who are really Messrs. Brown, Jenkins & Co.), since their incumbrance is subsequent in date to his. The question is whether he has done anything to displace his prior right in their favour. In *Shropshire Union Railways and Canal Co.* v. *Reg.* (1) it is stated by Lord Cairns L.C., in considering the rule of priorities, that to deprive an assignee of his prior equitable title the Court must find "something tangible and distinct, something which can have the grave and

(1) (1875) L. R. 7 H. L. 496, 506-7.

C. A. 1904 DALLAS, *In re.*

strong effect" of so depriving him. And in *Ward* v. *Duncombe* (1) it was again laid down by the House of Lords that there must be some act or omission on the part of the equitable assignee to deprive him of his priority. The foundation of the principle is negligence—that is to say, Has there been such negligence on the part of the equitable owner or assignee to give notice of his assignment or charge as to deprive him of his ordinary priority over a subsequent assignee or incumbrancer who may have been first in giving notice? Can it be said that he loses his prior equitable title because he could not by any possibility have given his notice earlier? Now here, on the death of the testator, there was no one to whom notice could be given except the executor, who was himself the assignor, and this state of things continued until the grant of administration, when for the first time there was a person who had legal control over the fund, and to whom effective notice could be given. There was no effective notice possible at the time the several incumbrances were given, that is, in the lifetime of the testator, and therefore no notice then given could have displaced Stuart's incumbrance, and again there could be no effective notice during the period between the death and the grant of administration: thus during that period also his incumbrance could not be displaced. Then he gives his notice on the very day he first becomes aware of the grant of administration. We submit that if there is no step the equitable incumbrancer can possibly take to perfect his title he cannot be said to have omitted anything so as to deprive him of his priority. Stuart's charge attached the moment the property charged came into existence: *Tailby* v. *Official Receiver*. (2) None of the cases in the books cover the present, for they all proceed on the fact that there is an existing fund at the time the assignment is taken. The principle on which notice gives priority was first laid down in *Dearle* v. *Hall* (3), the object of the principle being to do equity—to prevent a man from taking advantage of his fraud; but it cannot be used to support the proposition that a man can be deprived of his prior rights on the ground of his not having done that

(1) [1893] A. C. 369, 391–2. (2) 13 App. Cas. 523, 530.
(3) 3 Russ. 1; 27 R. R. 1.

which he could not do. The principle is stated by Lord Herschell and Lord Macnaghten in *Ward* v. *Duncombe*. (1)

[VAUGHAN WILLIAMS L.J. referred to *Holroyd* v. *Marshall* (2) and *Foster* v. *Cockerell*. (3)]

The mischief against which the rule in *Dearle* v. *Hall* (4) was directed does not exist in the present case. Here there was no trustee of the fund at the time the fund charged came into existence; that distinguishes this case from all the others.

[COZENS-HARDY L.J. There are the cases of the army agents who on the sale of the commission of a retiring officer received the purchase-money.]

There it was held that notices given to the army agents before the fund became the officer's property by the gazetting of his retirement were useless, as in *Buller* v. *Plunkett*. (5) In *Webster* v. *Webster* (6) it was said that the time when notice is given is of no importance if both notices are given previous to the period when the relation of trustee and cestui que trust is created, where that relation is not constituted until the money is actually received by or is due from the trustee.

[VAUGHAN WILLIAMS L.J. When do you say the trust of an administrator begins?]

I submit he is not a trustee until he has proceeded to administer, and, taking the present case, has set aside the legacy.

Somerset v. *Cox* (7) is also an authority that notice given before the fund charged has come into actual possession is wholly ineffectual. Army agents become trustees of the purchase-money paid for a commission only upon the publication of the officer's retirement in the *Gazette*: *Earl of Suffolk* v. *Cox*. (8) But the army agents' cases, upon which the learned judge below relied, really have no application to this case. He said that they establish the rule that where there are successive assignments of a chose in action not in existence at the time the assignments are executed, the priorities of those assignments

(1) [1893] A. C. 369.
(2) 10 H. L. C. 191.
(3) 3 Cl. & F. 456; 39 R. R. 24.
(4) 3 Russ. 1; 27 R. R. 1.
(5) 1 J. & H. 441.
(6) 31 Beav. 393.
(7) 33 Beav. 634.
(8) (1867) 15 W. R. 732.

C. A. 1904 DALLAS, *In re.*

will not depend upon their dates, but on the dates of the notices given by the assignees after the fund has come into existence. Our submission is (1.) that, when the fund is not existing at the time of assignment, there is no possibility of giving notice, for there is no trustee or other person to whom effective notice can be given; (2.) that if, when the fund comes into existence, there is still no trustee or other person to whom notice can be given, then the priorities will rank according to the dates of the assignments; and (3.) that when at a subsequent period there is a trustee of the fund appointed, the priorities will not depend upon the scramble in giving notice to that trustee. The learned judge said that if a trustee of the fund is appointed, whoever first gives notice to the trustee obtains priority; but we submit that is not correct: the circumstances under which the notices are given must be considered. *Calisher* v. *Forbes* (1) and *Johnstone* v. *Cox* (2) are, no doubt, the cases most against us; but in both cases, when the charges became operative by the fund charged coming into existence, there was a trustee to whom notice could be given.

[VAUGHAN WILLIAMS L.J. referred to *Collyer* v. *Isaacs*. (3)]

Notice is not really necessary to perfect the title of the assignee of an equitable interest: by virtue of his assignment he already "has a perfect equitable title": per Lord Macnaghten in *Ward* v. *Duncombe*. (4) It is said that if at the moment of the assignment there is a trust fund and also a trustee, the assignee must do what he can towards taking possession of the fund by giving notice and so, it is said, perfecting his title. The question is, Will the Court extend that to a case where, at the moment the assignment operates, there is no trustee? We admit that if at the moment of the assignment the assignee can complete his title by notice, he should do so; but, as Lord Macnaghten said in *Ward* v. *Duncombe* (5), the rule in *Dearle* v. *Hall* (6) ought not to be extended to a case not already covered by authority; and there is no authority for saying that it applies to a case where, as here, there

(1) L. R. 7 Ch. 109.
(2) 19 Ch. D. 17.
(3) (1881) 19 Ch. D. 342.
(4) [1893] A. C. 392.
(5) Ibid. 394.
(6) 3 Russ. 1; 27 R. R. 1.

was, at the dates of the assignments, no fund in existence and no trustee when it did come into existence: see also *Willes* v. *Greenhill*. (1) But if we are wrong on the first point, then we say that Stuart must be treated as having given notice to the only person to whom he could give notice, namely, to F. Dallas, the appointed executor under the will; being both mortgagor and executor, he of course knew of Stuart's charge, and thus had notice of it in 1897—that is, prior to the Brooks-Jenkins charge of June 15, 1898. Therefore, although F. Dallas subsequently renounced, still Stuart is in the same position as if he had given notice to a trustee who subsequently died or retired, and he is not to be prejudiced by the circumstance that another trustee is appointed who personally knows nothing of the notice already given: *In re Wasdale*. (2) Notice to an executor who afterwards renounces is not necessarily a bad notice. The Act 20 & 21 Vict. c. 77, s. 79, which provides that on renunciation by an executor his rights shall cease, does not say that all acts previously done by him are void, any more than acts done by him before probate; for instance, an executor can, before he proves the will, assign leaseholds: supposing he assigns and dies before probate, the assignment is not void. All the Act says is that "his" rights as executor shall cease, not that the rights of other persons shall cease: Williams on Executors, 9th ed. pp. 228, 250.

[VAUGHAN WILLIAMS L.J. *Brazier* v. *Hudson* (3) is an authority that if an executor does an act and dies without proving the will, the act will be valid, if the will is ultimately proved.]

That being so, we submit that the notice given by Stuart to F. Dallas as executor was a good notice.

Neither *Browne* v. *Savage* (4), to which the learned judge referred, nor *Lloyd's Bank* v. *Pearson* (5), which followed it, applies to this case.

Upon the whole we submit that the several incumbrances should rank in order of date.

(1) (1861) 4 D. F. & J. 147, 150.
(2) [1899] 1 Ch. 163.
(3) (1836) 8 Sim. 67; 42 R. R. 106.
(4) 4 Drew. 635.
(5) [1901] 1 Ch. 865.

C. A. 1904 DALLAS, *In re.*

Buckmaster, K.C., and *Romer Macklin*, for the petitioners, respondents on the appeal, were not called upon.

L. Ryland, H. W. Vaughan Williams, and *Hugo Marshall*, for the other incumbrancers served with the notice of appeal.

VAUGHAN WILLIAMS L.J. In my opinion the decision of Buckley J. is quite right and ought to be affirmed. Really almost all the questions which have been argued before us to-day by Mr. Terrell are concluded by authority. I wish, in order to clear the ground, without going into details, to shortly state sufficient to shew how the question arises which we have to determine in the present case.

Frederick Dallas had expectations under what he hoped would be the will of his father, Robert Dallas. At the time of his death Robert Dallas was a lunatic, and a receiver had been appointed of his estate, but he had in fact, before his lunacy, executed a will by which he bequeathed a sum of 10,000*l.* to his son, Frederick Dallas. Frederick Dallas in his father's lifetime somehow became aware of this fact, and then proceeded to raise money by charging his expectancy in favour of various persons. Then his father died, and in the will Frederick Dallas was named as an executor. Two other executors were named also, but they both died in the testator's lifetime. Unfortunately the incumbrances thus created by F. Dallas upon this fund which had come into existence and become his were very much larger than the 10,000*l.* The result is that the question has arisen as to the priority of those incumbrances.

After the death of his father, F. Dallas renounced the office of executor, and letters of administration were granted to his sister Mrs. Beedell. That grant was on March 4, 1903. On March 5 notices were given to Mrs. Beedell as administratrix of certain incumbrances which for brevity I will call the "Brooks-Jenkins incumbrances," for either Messrs. Brooks, Jenkins & Co. were themselves the incumbrancers, or their clients were. Now there was an incumbrance earlier, in point of date, than one of those incumbrances, namely, an incumbrance in favour of the appellant, Mr. Stuart. There could be

no effective notice given so as to affect priorities until the fund came into existence and there was some person who had control of the fund and to whom notice could be given. Therefore one begins with the proposition that there was no notice at all during the lifetime of the testator.

Then the next period we have to deal with is the period between the death of the testator and the renunciation of probate by F. Dallas. Now, with regard to that period, it is not necessary for us to decide whether there was a good notice, so as to affect priority, given to the executor named in the will, who subsequently renounced, before such renunciation, because it is plain on the authorities that if the person to whom the notice is given is himself the assignor, both in the case of the incumbrance first granted and also in the case of the later assignment, that cannot be an effective notice. The reason of that is this—that whatever view one takes of the principle upon which notice is allowed to affect priorities, it is common to all the theories of the principle upon which these notices are effective to alter priorities that the notice when given is given upon the hypothesis that the trustee or other person who legally dominates the fund will inform the person giving the notice whether there is any prior incumbrance in existence; and it is plain that in a case in which there is only one such trustee or person controlling the fund, and he has made the first assignment, it is futile to give him notice of the second assignment at all, because his obvious interest is to conceal from the puisne incumbrancer the first incumbrance he has made; for if the person proposing to make an advance were aware of the first incumbrance he would probably refuse to advance money on the security of a second assignment. We can dispose of this part of the case at once by referring to a case Buckley J. mentioned in his judgment of *Browne* v. *Savage*. (1) That was a case in which the actual question which had to be decided was whether a notice to one of several trustees, that one being the assignor, was a sufficient notice; and it was held that it was not a sufficient notice. And it was so held upon the ground that it was his intention to conceal

(1) 4 Drew. 635.

C. A. 1904 DALLAS, *In re.* Vaughan Williams L.J.

from the person giving the notice the very fact the discovery of which, if it existed, was the object of the notice. I thought at first, when that case was cited to us, that the ground of the decision was that the assignor would be likely to conceal the fact of his incumbrance from his fellow-trustees; but now I come to look into the case more fully, especially at p. 640 of the report, I see that the object of the concealment referred to by Kindersley V.-C. was not concealment from the co-trustees, but concealment of the fact of the earlier incumbrance from the person who was intending to make an advance upon a second mortgage. And that this is so is made, to my mind, very plain from the observations of my brother Cozens-Hardy in *Lloyd's Bank* v. *Pearson*. (1) That also, like *Browne* v. *Savage* (2), was a case where there were several trustees; but it is the principle which was dealt with by Cozens-Hardy J. that I propose to refer to. It is dealt with on p. 873 of the report ([1901] 1 Ch.). He says: "But it would be whittling away the rule, and indeed would be making it a mere trap, if it were to be held that the knowledge which an assignor trustee has of his own incumbrance is sufficient to give the assignee priority against a subsequent incumbrancer who gives due notice to all the trustees. This, I take it, was the view of Kindersley V.-C."

The result of the authorities, to my mind, is this—that, as notice to or knowledge of a sole assignor trustee is not an effective notice to operate on priorities, we may dismiss at once from this case all considerations of the knowledge of F. Dallas, the named executor who subsequently renounced. Even if there had been an express notice to him, it would not have been an operative notice for this purpose. Then, passing from that and inquiring when the next notice was given, we find that no other notice was given by any incumbrancer at all until after the grant of letters of administration to Mrs. Beedell. Those letters of administration were granted to her on March 4, 1903, and notice was given to her by the Brooks-Jenkins incumbrancers on March 5, and any effective notice which was given by Stuart was given several days subsequent to that.

(1) [1901] 1 Ch. 865. (2) 4 Drew. 635.

In that state of things the question we have to answer here is, Ought the Brooks-Jenkins incumbrance which in point of date of creation is subsequent to the Stuart incumbrance to take priority of the Stuart incumbrance? The title possessed by the several incumbrancers is equitable only, and their equities would, in ordinary course, be in order of date; but the Brooks-Jenkins incumbrancers were the first to give notice of their incumbrances. Now, the ground upon which Mr. Terrell sought to argue that that notice alone ought not to give priority to any of those incumbrances was this: he said that the whole principle upon which notice is allowed to affect priorities is that those who have not given notice have been guilty of some neglect of duty. Now, if that be the true principle, it cannot be said that Stuart was guilty of any neglect of duty whatever. He could not have given notice during the lifetime of the testator. So far as F. Dallas, the assignor and the named executor in the will, was concerned, Stuart could not have given an effective notice to him; and therefore the first time at which he could have given an effective notice was upon the grant of letters of administration. He could not tell when that was going to take place, and he could not prevent the Brooks-Jenkins incumbrancers from giving the first notice, for it was through Messrs. Brooks, Jenkins & Co., their solicitors, that application was made for the letters of administration which were granted to Mrs. Beedell.

Now, I agree so far with Mr. Terrell that there is no reason to attribute any negligence to Stuart; but the answer is that that is not the true principle to be applied. The true principle has been determined once and for all by the case of *Ward* v. *Duncombe*. (1) Now, it seems to me that that case decides that the principle which has been suggested by Mr. Terrell in his argument as the ground on which notice, when given, has the effect it is allowed to have in a question of priorities is not the true principle. That case has been discussed a good deal in the course of the argument, and I do not propose to go through it at any unnecessary length; but, turning to p. 390 of the report, I find Lord Macnaghten says

(1) [1893] A. C. 369.

C. A. 1904 DALLAS, *In re.* Vaughan Williams L.J.

this: "It may, perhaps, be doubted whether the views of Sir Thomas Plumer in *Dearle* v. *Hall* (1) were quite correctly appreciated in *Foster* v. *Cockerell* (2), which gives the go-by to all considerations founded upon the conduct of the parties. But however that may be, *Foster* v. *Cockerell* (2) unquestionably lays down that the rule known as the rule in *Dearle* v. *Hall* (1) is independent of any consideration of the conduct of the competing assignees, where the assignee second in date has no notice of the earlier assignment. Priority in such a case depends simply and solely on priority of notice."

I cannot imagine any words which could more clearly lay down the principle upon which these notices are supposed to operate. They operate independently of any consideration of conduct of the competing assignees, but simply and solely on priority of notice. It is quite true that Lord Macnaghten goes on to say (3): "My Lords, I have made these observations, not for the purpose of impugning the authority of the rule in *Dearle* v. *Hall*. (1) The rule is settled law. But it seems to me that when your Lordships are asked to extend the rule to a case not already covered by authority, it is proper to inquire into the principles upon which the rule is said to be founded. For the reasons which I have already given, I do not think that those principles are so clear or so convincing that the rule ought to be extended to a new case."

Having said that, I think I ought not to occupy time by referring to the arguments, or to the opinions of the Law Lords, in the case of *Foster* v. *Cockerell* (2) to shew that Lord Macnaghten's view of what was decided in that case is perfectly accurate, further than to say this, that when one looks at those arguments it is perfectly obvious that the contention of the counsel for the appellants in that case was almost identical with the contention of Mr. Terrell to-day, and their contention was really answered by the Court holding that the rule known as the rule in *Dearle* v. *Hall* (1) was a rule to the effect, and based on the principle, stated by Lord Macnaghten.

I have now disposed of the principal argument in this case;

(1) 3 Russ. 1; 27 R. R. 1. (2) 3 Cl. & F. 456; 39 R. R. 24.
(3) [1893] A. C. 394.

but there is a word or two more to be said, because Mr. Terrell was relying rather on what Lord Macnaghten said with regard to not extending the rule in *Dearle* v. *Hall*, (1) Mr. Terrell says that in the present case there was no fund at all until the death of the testator, and that after the fund came into existence upon the death of the testator there was no trustee or other person to whom an effective notice could be given, and he said it would be an extension of the rule in *Dearle* v. *Hall* (1) if we allowed it to apply here. Now, really that contention is completely answered by what I will shortly describe as the army agents' cases. It is quite plain that in those cases there was a time during which there was no trustee to whom a notice could be given, and yet the result of those cases was that notices given when such a person came into existence were held to be good notices effective to alter priorities.

I do not think there is any other point to deal with, and I have only to say that, in my opinion, the judgment of Buckley J. ought to be affirmed, and that the appeal must, therefore, be dismissed.

STIRLING L.J. I am of the same opinion. The question to be determined here is whether the rule laid down in *Dearle* v. *Hall* (1) is applicable to the present case. Now, the rule established by *Dearle* v. *Hall* (1) is, in the words of Lord Macnaghten in *Ward* v. *Duncombe* (2), "That an assignee of an equitable interest in personal estate without notice of an existing prior assignment may gain priority simply by the act of giving notice to the person who has legal dominion over the fund before notice is given by the earlier assignee."

It has been contended before us that the rule ought not to be applied where the earlier assignee has not been guilty of any negligence in serving notice; but the passage already cited by my Lord from Lord Macnaghten's speech in *Ward* v. *Duncombe* (3) appears to me to entirely negative that argument. It is quite true, as has already been pointed out, that Lord Macnaghten went on to observe that it was difficult to state

(1) 3 Russ. 1; 27 R. R. 1. (2) [1893] A. C. 384.
(3) [1893] A. C. 390-1.

C. A. 1904 DALLAS, *In re.* Stirling L.J.

exactly the principle upon which the rule in *Dearle* v. *Hall* (1) was established, and at least he warns those who have to apply that rule against extending it to a new case. Then the question we have to consider is whether this case is or is not covered by authority. It may be said at once that there is no case reported in the books entirely like the present in its facts; but, in my opinion, the army agents' cases really govern this case, especially *Johnstone* v. *Cox* (2), which was affirmed by the Court of Appeal. (3) At that time, in accordance with the law which applied to the sale of commissions in the army, an officer, when he retired from the service, was entitled, by the Regulation of the Forces Act, 1871 (34 & 35 Vict. c. 86), s. 3, to receive the purchase-money for his commission. It was paid by the Government to army agents; it was placed on deposit with the army agents, but could not be paid to the officer or placed to his credit by the agents until his retirement had been gazetted. In the case referred to the incumbrancer who was first in date gave notice of his charge to the army agents, but before notice of the officer's retirement appeared in the *Gazette*. Then, the day after the notice in the *Gazette*, the second and third incumbrancers gave notice, and the first incumbrancer in point of date gave another notice five days after the notice in the *Gazette*. It was decided that the order of priority of the incumbrancers was that the second in date came first, then the third in date, and the first incumbrancer in point of date came third; so that the second and third incumbrancers, by giving notice after the fund had been paid to and was in the hands of the army agents as agents for the officer, gained priority over the first incumbrancer, whose notice was given last.

Now what happened here was that F. Dallas executed several assignments of his expectancy. At the death of the testator he, the person who had given these charges, was himself sole executor of the will, and no effective notice could in fact be given while that state of things existed. He renounced his executorship, and letters of administration with the will annexed

(1) 3 Russ. 1; 27 R. R. 1. (2) 16 Ch. D. 571.
(3) 19 Ch. D. 17.

were granted to his sister. Then notices were given to her by some of the incumbrancers on March 5, 1903, and on March 12 notice was given by Stuart, another incumbrancer.

Now, the question is whether the principle in *Johnstone* v. *Cox* (1) does not apply to the facts of this case. It seems to me that it does, and that it applies in this way, that although, at the time when the incumbrances became operative, there was no person who had control of the fund, yet the position was altered the moment a person came into existence who had such control and to whom effective notice could be given. It was said that the distinction between this case and the army agents' cases is that in those cases, at the moment when the fund came into existence, there was a person who had the legal dominion over it to whom notice could be given, while in this case there was not; but, in my opinion, that is a matter of detail and does not make any difference in principle.

Then the point lastly made was this, that the priorities ought to be established by the fact that F. Dallas was executor, and that the case stands in the same position as where an incumbrancer who has given notice to a trustee who has since died or retired is held not to be prejudiced by the fact that another trustee is appointed who is not aware of the notice already given and receives fresh notice. Upon that point I agree with what has been said by my Lord, and only say that we are not now deciding whether notice to an executor who does not act and renounces is of any value whatever; but personally I should be very loth to hold that it is.

COZENS-HARDY L.J. I am of the same opinion, and I am so entirely satisfied with the reasons stated by Buckley J. and by my brethren that I will not occupy more than a few minutes.

Since the case of *Ward* v. *Duncombe* (2) there is very little open to us to do beyond repeating that the rule in *Dearle* v. *Hall* (3) is in no way dependent upon the conduct of the assignees. It is also settled quite clearly that the rule applies

(1) 16 Ch. D. 571. (2) [1893] A. C. 369.
(3) 3 Russ. 1; 27 R. R. 1.

C. A. 1904

DALLAS, *In re.*

Cozens-Hardy L.J.

equally although there is no trust fund and no trustee in existence at the date of the several assignments. The army agents' cases are only intelligible on this principle. *Johnstone* v. *Cox* (1) was a clear decision on this point, although in that case the point was not elaborately dealt with either by Bacon V.-C. or by the Court of Appeal because it had been dealt with already by the Court of Appeal in *Calisher* v. *Forbes* (2), and it was recognised and assumed by Lord Selborne in *Addison* v. *Cox* (3), so that it is not now left open to us to consider it. Therefore it appears to me that there is only one point open to us. It is said that F. Dallas, as assignor, had knowledge (as of course he had) of his own incumbrance, and that the knowledge which he possessed of his own incumbrance, he being an executor named in the will, must be regarded as equivalent to a notice entitling the assignees to priority in order of the dates of the assignments. I cannot take that view. It appears to me that the knowledge of the assignor is quite a different thing from the notice that is given by an assignee to the person who has control of the fund. Under these circumstances it is not necessary to decide whether notice to an executor who renounces and disclaims can have any effect or validity; but, speaking for myself, I should require a great deal of argument to induce me to assent to that proposition.

[The appeal was accordingly dismissed, but with one set of costs only—the petitioners'; the other respondents to add their costs to their securities.]

Solicitors: *G. S. Warmington & Co.; Brooks, Jenkins & Co.; Smiles & Co., for Duignans & Elliot, Walsall; A. J. Speechly; Marshall & Marshall.*

(1) 19 Ch. D. 17. (2) L. R. 7 Ch. 109.
(3) L. R. 8 Ch. 76.

G. I. F. C.

BISHOP AUCKLAND INDUSTRIAL CO-OPERATIVE SOCIETY, LIMITED *v.* BUTTERKNOWLE COLLIERY COMPANY, LIMITED.

C. A. 1904 FARWELL J. *Jan.* 23, 25; *Feb.* 1. C. A. *June* 6, 7, 8, 9, 10, 15; *July* 15.

[1903 B. 1212.]

Inclosure Act, Construction of—Mines—Reservation of Manorial Rights—Support—Damage to Surface—Compensation.

The plaintiffs were owners of the surface of freehold lands allotted to them by an Inclosure Act of 1757 relating to waste lands of a manor; the defendants were lessees from the successors in title of the lord of the manor at the date of the Act of mines under these same lands; the question for decision was whether on the construction of the clauses in the Inclosure Act authorizing the lord to search for, work, and carry away the coal and minerals under the inclosed lands as fully and freely as he might have done had this Act not been passed, without making or paying any satisfaction for so doing, the defendants were entitled to let down and destroy the plaintiffs' lands. There was a compensation clause in the Act providing that any damage done by the exercise of the powers reserved to the lord should be paid for by an assessment upon the occupiers of the other allotments:—

Held (affirming the decision of Farwell J.), that the Act, construed as a whole, did not clearly take away from the surface owners their common law right to support, and that the plaintiffs were entitled to an injunction.

The general principles applicable to the construction of Inclosure Acts collected and stated by Farwell J.; and per Lord Davey in *New Sharlston Collieries Co.* v. *Earl of Westmorland* (note, p. 443). The question of right to support is one of construction in each case, and the same principles apply whether the instrument be a grant, lease, or Inclosure Act.

The decision in *Consett Waterworks Co.* v. *Ritson*, (1889) 22 Q. B. D. 318 and 702; 64 L. J. (Ch.) 293, n., is not of authority beyond the special provisions of the Act which the Court had then to construe.

THE plaintiffs in this action were the owners of four acres of land in the chapelry of Hamsterley, in the manor of Wolsingham, in the county of Durham. The defendants were lessees from the Ecclesiastical Commissioners, the lords of that manor, of mines of coal under the same lands. The plaintiffs claimed to restrain the defendants from working the coal so as to let down the surface of their land, or so as to injure any of the plaintiffs' buildings.

The plaintiffs' land was originally part of the waste of the

C. A. 1904 BISHOP AUCKLAND INDUSTRIAL CO-OPERATIVE SOCIETY, LIMITED v. BUTTERKNOWLE COLLIERY COMPANY, LIMITED.

manor of Wolsingham, which was inclosed under an Inclosure Act of 31 Geo. 2. The defendants contended that by the provisions of this Act the Bishop of Durham, who was then lord of the manor, and his successors were authorized to work the minerals under the lands inclosed without leaving any support for the surface or making any compensation.

The statement of defence also alleged that the lord was entitled by the custom of the manor to work the minerals under the waste without leaving any support; but it was admitted at the hearing that he could only work them subject to the usual obligation to leave sufficient pasture for the commoners.

The provisions in the Inclosure Act relating to the minerals were as follows:—

"Nothing in this Act contained shall be construed to defeat, lessen, or prejudice the right, title, and interest of the lord of the manor of Wolsingham aforesaid of, in, and to the seigniory and royalties incident and belonging to the said manor . . . . And also that the said Lord Bishop of Durham, his successors and assigns, shall and may, from time to time and at all times hereafter, have, hold, and enjoy all mines and quarries of what nature or kind soever, lying and being in and under the said moors and commons so to be divided and inclosed as aforesaid (other than and except such quarries of stones as are hereinafter mentioned), together with all convenient and necessary ways and way-leaves, and liberty of laying and repairing wagon ways and other ways in, over, and along the same, or any part thereof, and of searching for, winning, and working the said mines and quarries, and leading and carrying away the coals, lead, minerals, stones, and other things to be gotten thereout, and making drifts, levels, watercourses, erecting and using fire-engines, and other engines, pit-rooms, and other usual liberties, as fully and freely as he or they might or could have had and enjoyed the same in case this Act had not been made, and that without making or paying any satisfaction for so doing. And whereas great inconveniences may happen and damage be done to particular persons by reason of the searching for, winning, and working the mines and quarries within and under their respective allotments by the said Lord Bishop of Durham,

his successors and assigns, without making or paying any satisfaction for so doing: for remedy thereof be it hereby enacted, by the authority aforesaid, that when and so often as any person or persons shall suffer or sustain any loss or damage in his, her, or their respective allotments by the searching for, winning, and working of the mines and quarries therein, or the laying and repairing wagon-ways and other ways or by the leading and carrying away the coals, lead, minerals, stones, or other things to be gotten thereout, or making drifts, levels, watercourses, or erecting or using fire-engines or other engines, pit-room, or other liberties and powers hereby given and reserved to the said Lord Bishop of Durham, his successors or assigns, upon complaint thereof, and by such person or persons so damnified as aforesaid, to one or more justice or justices of the peace in and for the said county of Durham (notice of such intended complaint having been first given by such person or persons in the chapel of Hamsterley aforesaid, on some Sunday morning preceding such complaint), such justice or justices is and are hereby empowered and required to examine and inquire into such complaint or complaints in a summary way, either by examination of witnesses upon oath, or, being the people called Quakers, upon their solemn affirmation (which said oath or affirmation the said justice or justices is and are hereby empowered to administer), or by such other evidence or proof, ways, and means as to him or them shall seem requisite and expedient in that behalf, and finally to assess, settle, and determine the damages sustained by such person or persons as aforesaid, which damages shall be paid and borne by the occupiers of the several other allotments lying and being in such and the same township in which the allotment or allotments in which such damages shall be committed lie, according to the respective yearly values or rents of such allotments in such proportions and shares as the said justice or justices shall direct or appoint."

Then followed a power to enforce payment of the proportions by distress and sale of the goods and chattels of defaulters.

The Act gave power to the owners of allotments to win, work, and get stone in their several allotments and in certain common

C. A. 1904 BISHOP AUCKLAND INDUSTRIAL CO-OPERATIVE SOCIETY, LIMITED v. BUTTERKNOWLE COLLIERY COMPANY, LIMITED.

quarries to be set forth by the Commissioners for necessary or convenient buildings and reparations and erecting walls and fences.

The action came on for hearing before Farwell J. on January 23, 1904.

Upjohn, K.C., and *O. L. Clare*, for the plaintiffs. On the true construction of this Act there is nothing to enable the defendants to work their mines so as to let down the surface. The case which settled the law as between the owner of the surface and owners of minerals is *Davis* v. *Treharne*. (1) The presumption is in favour of the surface owner. The burden of proof is on the mineral owner who claims to let down the surface, and he can only succeed if it is quite clear upon the documents that the surface owner has agreed to give up his common law right of support. *Love* v. *Bell* (2) shews that precisely the same rules apply when the document to be construed is an Inclosure Act, and that the mere reservation of the lord's rights in as ample a manner as he had them before will not give him a right to work without leaving support. Lord Selborne pointed out, in distinguishing the case before the House from *Duke of Buccleuch* v. *Wakefield* (3), the distinction between a reservation of old rights and a grant of new rights. This case is absolutely covered by *Love* v. *Bell*. (2)

Danckwerts, K.C., and *MacSwinney*, for the defendants. In *Love* v. *Bell* (2) the mines were merely included among many other things in the general reservation of rights. In the Act which has to be construed in this case the general saving clause does not include mines. It is followed by a special clause which amounts to a new grant. Moreover, in *Love* v. *Bell* (2) the compensation clause clearly did not provide compensation for letting down the surface. It is clear from all the judgments that if the Act had provided compensation for letting down the surface the decision would have been the other way. In this case the compensation clause provides for compensation by assessment on all the allottees for all damage done by working

(1) (1881) 6 App. Cas. 460. (2) (1884) 9 App. Cas. 286, 296.
(3) (1870) L. R. 4 H. L. 377.

the minerals, and that would include damage by letting down the surface.

This case is exactly covered by the decision of the Court of Appeal in *Consett Waterworks Co.* v. *Ritson.* (1)

Gill v. *Dickinson* (2) decided upon the construction of this very Act that the lord has power to work without leaving support for the surface.

In *Bell* v. *Earl of Dudley* (3) the words were practically the same as in this case, and Chitty J. distinguished the case from *Love* v. *Bell* (4), and held that it was governed by *Duke of Buccleuch* v. *Wakefield.* (5) In *Attorney-General* v. *Welsh Granite Co.* (6) the same construction was adopted. Here the Act reserves power to work quarries which would necessarily destroy the surface.

Upjohn, K.C., in reply. The powers in *Consett Waterworks Co.* v. *Ritson* (7) were very much wider than those in the present case.

In *Hext* v. *Gill* (8) the Court of Appeal held that clay was within the reservation of minerals to the lord, but he could not work it because it would destroy the surface.

In *Buchanan* v. *Andrew* (9) Lord Selborne stated that a reservation of minerals with full powers of working, "and that free of all or any damage which may be thereby occasioned to the feuar," in a Scotch deed would not give the owner power to let down the surface; but in that particular case other words were added which did give that power.

In *New Sharlston Colliery Co.* v. *Earl of Westmorland* (10) words very nearly the same as those in the *Consett Case* (7) were held insufficient.

Gill v. *Dickinson* (2) was heard on demurrer, and really turned on a point of pleading, for a custom to let down the

(1) 22 Q. B. D. 318, 702. Counsel read Lord Esher's judgment from a shorthand note; the case is fully reported before the Court of Appeal in 64 L. J. (Ch.) 293, n.
(2) (1880) 5 Q. B. D. 159.
(3) [1895] 1 Ch. 182.
(4) 9 App. Cas. 286.
(5) L. R. 4 H. L. 377.
(6) (1887) 35 W. R. 617.
(7) 22 Q. B. D. 318.
(8) (1872) L. R. 7 Ch. 699.
(9) (1873) L. R. 2 H. L., Sc. 286.
(10) (1900) 82 L. T. 725. See note at end of case, p. 443.

C. A. 1904

BISHOP AUCKLAND INDUSTRIAL CO-OPERATIVE SOCIETY, LIMITED v. BUTTERKNOWLE COLLIERY COMPANY, LIMITED.

surface was alleged by the statement of claim, and of course admitted by the demurrer. But such a custom has been held to be bad: *Blackett* v. *Bradley*. (1)

Cur. adv. vult.

Feb. 1. FARWELL J. The question in this case turns on the construction of an Inclosure Act (31 Geo. 2, c. 32). The plaintiffs are surface owners and the defendants are lessees of minerals claiming under the Ecclesiastical Commissioners (who derive title from the Bishop of Durham) in and under lands in Durham, and the short point is whether the defendants, working in the ordinary manner and not negligently, are entitled to let down and destroy the surface of the lands in question. These lands contain four acres, and are situate within the chapelry of Hamsterley, in the manor of Wolsingham, and were prior to the Inclosure Act part of the waste of the manor. The lord of the manor was seised of the soil of the manor and entitled to the mines and minerals thereunder in fee simple, subject only to the ordinary rights of pasturage in the commoners. This right involved some restriction on the lord's right of working and getting the minerals—namely, that he must have left a sufficiency of pasturage for the commoners. The commons and wastes of the manor were duly inclosed and divided by an award made under the Inclosure Act.

Questions on the construction of Inclosure Acts have frequently come before the Courts, and, although each case of course depends on the wording of the particular Act, there is sufficient similarity between them to warrant the deduction of some general principles applicable to all such Acts; and, indeed, these principles have been settled by numerous decisions, many of them in the House of Lords, and may be stated as follows: The surface owner has by common law the right to have proper support for his surface so as to prevent its subsidence. If the mineral owner contests this right, the burden is on him to displace it. The right can only be displaced by express words or by necessary implication from the words used in the Act. Words,

(1) (1862) 1 B. & S. 940.

however large, applicable to the right of working and privileges connected with it and compensation for the exercise of such right and privileges are not enough, at any rate, if the words used are fairly applicable to the ordinary course of working and nothing more: see Lord Selborne's judgment in *Love* v. *Bell.* (1) The absence of any provision for compensation is strong evidence in favour of the continuance of the right to support. So also is the presence of a compensation clause limited to injury arising from ordinary surface user as distinct from injury by subsidence or obviously inadequate to any greater injury; but a compensation clause providing expressly for injury to buildings or other injury resulting from subsidence is in favour of the destruction of the right. But this is a question of construction, for, as stated by Lord Davey in *New Sharlston Collieries Co.* v. *Earl of Westmorland* (2), the existence of an express provision for compensation for letting down the surface does not necessarily authorize the mine owner to let it down. The question is one of construction in each case, and the same principles apply whether the document be a grant, lease, or Inclosure Act. The latter is nothing more than a statutory agreement between the parties, or, as Lord Selborne puts it (1), "it is a case of mutual considerations resulting in the apportionment of land to which the parties may be taken to have agreed, or have had determined for them by the authority which made the award." It is important to ascertain whether the mineral owner's rights are merely reserved or whether they are newly created by grant. In the latter case there is more ground than in the former for the argument that the ordinary common law right of support has been displaced: *Duke of Buccleuch* v. *Wakefield* (3); *Love* v. *Bell.* (4) The reservation of the lord's rights to be enjoyed in as full and ample a manner as if the Act had not been passed is not equivalent to a reservation free from the common law liability to leave support merely because the only liability before the Act was to leave sufficient pasturage, but is to be read as subject to the ordinary maxim "Sic utere tuo ut alienum non

(1) 9 App. Cas. 289, 290, 291.
(2) See note at end of case, p. 443.
(3) L. R. 4 H. L. 377.
(4) 9 App. Cas. 291, 292.

C. A. 1904

BISHOP AUCKLAND INDUSTRIAL CO-OPERATIVE SOCIETY, LIMITED v. BUTTERKNOWLE COLLIERY COMPANY, LIMITED.

Farwell J.

lædas," so that, mutatis mutandis, it becomes subject to the substituted ownership right of support in lieu of the extinguished commoners' right of pasturage; and, accordingly, if there were no such commonable rights, no substituted right of support can be maintained: *Gill* v. *Dickinson*. (1)

In the case before me the lands to be inclosed were about 7000 acres, and provision is made in the usual way for their allotment amongst the several persons having a right of common therein in certain proportions as freehold or copyhold as the case might be (in the case before me the allotment to the plaintiffs' predecessors in title was as freehold), all rights of common are extinguished, and then come the clauses on which the question chiefly turns. I will not pause to read them through, but, bearing in mind the principles to which I have already referred, I remark (1.) that, in my opinion, the mines and minerals are reserved, not granted, and (2.) that they are so reserved subject to the principle "Sic utêre tuo," &c. As to (1.), the fee simple was vested in the lord at the passing of the Act, and there is nothing in the Act to take it away from him until the award is made—which is necessarily in futuro. The provision as to allotment is that "all such lands as shall . . . . be allotted to any person . . . . shall be vested and held by such person . . . ." The words relating to the minerals are words operating de præsenti, and take effect by way of reservation of the existing estate, nor are there any such unusual powers or provisions therein contained as would not follow from, or be incident to, a mere reservation. On (2.) I observe that the words "as fully and freely as he or they might or could have had and enjoyed the same in case this Act had not been made" are in immediate collocation with and precede the words "and that without making or paying any satisfaction for so doing." These latter words, excluding compensation, afford, in my opinion, strong grounds for limiting the reservation to the ordinary rights of ownership. If it is not so, the reference to the antecedent title is meaningless; but the emphasis on the non-payment of compensation ("and that without, &c.") follows immediately on the words referring to the antecedent title, and is to be read with them, and when so read amount to the

(1) 5 Q. B. D. 159.

reasonable and intelligible provision that so long as the mineral owners work in exercise of the usual common law rights they are to pay no compensation to any one. I further observe on this clause that the reserved liberties may all be satisfied by the exercise of surface rights, but that, even if and so far as they may extend to injury to the surface by working, it is to be remembered that the reservation in this case extends to quarries as well as to mines, and that the usual mode of working a quarry necessarily destroys the surface. If, then, any words are found in this or the next clause which appear to point to the destruction of the surface by working, they may well be satisfied by applying them to the quarries and stone reserved—reddendo singula singulis—so as not unnecessarily to destroy the subject-matter of the property allotted to the commoners. Further, I can find in the next clause providing for compensation no such wide phrases or rights as influenced Lindley L.J.'s judgment in the *Consett Case*. (1) All appear to me to be quite consistent with the working of mines and quarries in the ordinary way and subject to the ordinary rights of surface owners. Further, the fact that the compensation is to be paid by the occupiers of the other allotments and not by the owners confirms me in my view. The amount of compensation payable for the usual surface user could not well be large—that for letting down the surface with buildings thereon might be enormous—but the people to pay are not the owners in fee, but the occupiers, and only such occupiers as occupy allotments in the same township. If the Legislature really contemplated the payment of substantial compensation, it is strange that they should have attached the liability to occupiers, probably for the most part shepherds, hinds, and gamekeepers, who would know nothing of the existence of any such liability, and might find all their property sold under distraint without its sufficing to discharge a hundredth part of the amount of damage done. If considerations of justice to the person liable to pay, and of sufficiency of satisfaction to the person entitled to receive, are entitled to any weight, they appear to me to be strongly in favour of the preservation of the right to support. If the defendants are right, the occupation as a

(1) 22 Q. B. D. 318, 702; 64 L. J. (Ch.) 293, n.

C. A. 1904

BISHOP AUCKLAND INDUSTRIAL CO-OPERATIVE SOCIETY, LIMITED v. BUTTERKNOWLE COLLIERY COMPANY, LIMITED.

Farwell J.

yearly tenant of a small house in the district may entail ruin on the occupier.

Further, the persons liable to pay in respect of damage to the allotment injured are the occupiers of other allotments within that township. It appears that there are four townships comprised in the Act. Suppose them to be of equal extent so that each contains 1725 acres. This is not a large area, and may quite possibly be in the occupation of two farmers in farms of practically equal amount and value. If farmer A. is injured by his surface being let down, his neighbour B. must pay him compensation for it. If B. is injured, A. must pay him. If the injury be for the ordinary surface user, it is practically certain that they will not suffer alike, and the amounts payable would be small. But assume that both farmhouses are let down, as might well happen, the idea that each compensates the other appears to me too ludicrous to be adopted unless it is unavoidable.

Again, suppose the size of the four townships to be unequal so that there is one containing as little as 500 or 600 acres. This may well be the farm of one man. Is he to pay himself if his farmhouse is let down, or is he to distrain upon such of his labourers and carters as happen to occupy cottages in the township? The ordinary surface user by roads and the like would avoid buildings, so that the question would not arise; but underground workings are more likely to cause subsidence where there is the additional weight of buildings superimposed than where the surface is unbuilt upon. In my opinion the mode of obtaining compensation provided by the Act is quite inadequate to provide a sufficient amount, and might well have the effect of depopulating the area subject to such a liability, and so become more and more inadequate. Is there, then, any authority which prevents me from deciding in accordance with my own opinion? There is one reported case on this very Act, *Gill* v. *Dickinson* (1), but the reasoning on which that case proceeded is quite consistent with my view. The case was heard on demurrer; and it was admitted, and the judgment of the Court turned on the admission, that before the Act the

(1) 5 Q. B. D. 159.

lord worked as he pleased without paying any satisfaction, and the decision was that the Act preserved the status quo ante. Here the admissions are that the commoners had the usual right of common of pasturage which involves the limitations of the right of working that I have above stated. *Bell* v. *Earl of Dudley* (1) is also distinguishable, for there was there an adequate compensation clause. But the case most relied on by Mr. Danckwerts was *Consett Waterworks Co.* v. *Ritson* (2), in the Court of Appeal, with the shorthand notes of the judgments in which I have been supplied. In my opinion that case is also distinguishable. Lord Esher's first point was that the Act was to be construed having regard to the position of the parties affected, and that the Bishop of Durham was one of the most powerful landowners and had "immense powers," and that the humbler commoners were glad to take such crumbs as he deigned to give them. But in the case before me the two first-named commoners are Lord Darlington and his son William, Lord Vane; and I venture to think that the owners of Raby Castle and the enormous estates attached to it stood on equal terms even with the Prince Bishop of Durham, and, in addition to this, their political influence is a matter of history. Lord Darlington married a sister of Sir James Lowther, afterwards Lord Lonsdale, whose political influence as the owner of nine pocket boroughs is notorious, and Lord Vane owed his subsequent advancement to a marquisate and dukedom to the possession of six pocket boroughs. If the position of the parties be a legitimate consideration, I cannot think that the bishop had in this case any such commanding advantage as Lord Esher found that he possessed in the *Consett Case*. (2) The next point was the compensation clause. But in that case it was adequate. An estate was allotted to create a fund, and the owners as well as the occupiers of 30,000, and not as here of a few hundred, acres were made to contribute; and, further, there were large powers referred to by Lindley L.J. which are not to be found in the present case. Not only can I find nothing in any of the cases which compels me to decide contrary to my own opinion, but I have great doubt whether the *Consett Case* (2) or *Bell* v.

(1) [1895] 1 Ch. 132. (2) 22 Q. B. D. 318, 702; 64 L. J. (Ch.) 293, n.

C. A. 1904

BISHOP AUCKLAND INDUSTRIAL CO-OPERATIVE SOCIETY, LIMITED v. BUTTERKNOWLE COLLIERY COMPANY, LIMITED.

Earl of Dudley (1) can stand with the subsequent decision of the House of Lords in *New Sharlston Collieries Co.* v. *Earl of Westmorland.* (2) [His Lordship read the greater part of the speeches of Lord Halsbury and Lord Davey.] The only question raised in this action is with respect to mines, and I make the declaration and grant the injunction as asked, and direct an inquiry as to damages as already arranged. The defendants must pay the costs of the action; the costs of the inquiry will be reserved.

J. R. B.

C. A.

The defendants appealed. The appeal came on for hearing on June 6, 1904.

Danckwerts, K.C., and *MacSwinney*, for the defendants. The case turns upon the construction of the Act of 1757. It is submitted that that Act contains in effect a parliamentary grant to the lord of the mines and quarries. All the rights of the lord are reserved. He could therefore take away the whole of the coal under the land, provided that he left sufficient common to the commoners. The subsidence of the land would not affect the pasturage. The intention was to divest the commoners of the right to complain of any damage done by the lord. *Buchanan* v. *Andrew* (3) was very like the present case. There it was held that by the terms of a contract a landlord was not liable for damage resulting from the working of minerals under the demised property. The provision for compensation made by the Act is complete; if one commoner is damaged by the working of mines the other commoners are to compensate him. It is immaterial whether the compensation provided is or is not adequate; it is that which the Legislature have deemed to be sufficient. The present case is really covered by prior decisions from which, it is submitted, Farwell J. has departed: *Smith* v. *Darby* (4); *Duke of Buccleuch* v. *Wakefield.* (5) A

(1) [1895] 1 Ch. 182.
(2) See note at end of case, p. 443.
(3) L. R. 2 H. L., Sc. 286, 289, 293.
(4) (1872) L. R. 7 Q. B. 716.
(5) L. R. 4 H. L. 377, 395.

distinction was formerly made between cases in which the owner of land granted the surface, reserving the minerals under it, and cases in which he granted the minerals and retained the surface: *Dixon* v. *White* (1); but that distinction may be taken now to have been abolished.

In *Davis* v. *Treharne* (2) it was held that the existence of a compensation clause did not per se establish that there was a right to let down the surface. That must depend upon the words of the grant of the minerals. But if the words of grant are sufficient their effect will be strengthened by a compensation clause, and such a clause will aid in the construction of an ambiguous grant. In *Bell* v. *Love* (3) the compensation clause was limited in amount, and it was held that it did not extend to damage from subsidence and that there was no right to let down the surface in working the minerals.

It is submitted—(1.) That a grant of minerals by deed or by statute may confer the right to let down the surface without making compensation. (2.) The onus is on those who assert that such a right is conferred. (3.) But, if it is plain that a right to let down the surface is conferred, it is immaterial that the compensation provided is inadequate. (4.) If it is plain that the words of grant do not of themselves confer the right to let down the surface, the existence of a compensation clause will not give that right. (5.) If the words of grant are ambiguous, and there is a compensation clause applicable to letting down the surface, the grant will be construed accordingly. (6.) The onus is on the person who alleges that he has a right greater than his common law right. In *Bell* v. *Love* (3) there was merely a reservation of the lord's rights, and it was held that that alone would not entitle the lord to let down the surface. In the present case there is more than a general reservation of the lord's right to work the mines; there is that which is equivalent to a grant of the mines by the copyholders: *Aspden* v. *Seddon*. (4) Other instances in which

(1) (1883) 8 App. Cas. 833, 842, 843.

(2) 6 App. Cas. 460.

(3) (1883) 10 Q. B. D. 547; 9 App. Cas. 286.

(4) (1875) L. R. 10 Ch. 394.

C. A. 1904 BISHOP AUCKLAND INDUSTRIAL CO-OPERATIVE SOCIETY, LIMITED v. BUTTERKNOWLE COLLIERY COMPANY, LIMITED.

it was held that there was no right of support are *Consett Waterworks Co.* v. *Ritson* (1) and *Thompson* v. *Mein.* (2) It is contended that *Consett Waterworks Co.* v. *Ritson* (1) really governs the present case.

Whether the right to let down the surface existed before the Inclosure Act does not matter. It is a new grant. A reservation operates as a grant.

[ROMER L.J. I do not see that it makes any difference whether this is an exception or a regrant.

VAUGHAN WILLIAMS L.J. It is enough for you if we treat the whole thing as passing by the Act.]

Yes; the difference is not important for the present purpose: *Dixon* v. *White.* (3) It is only a question of construction of the language of a particular Act of Parliament. This was a reservation which operated as a fresh grant to the bishop: *Durham and Sunderland Ry. Co.* v. *Walker* (4); *Wickham* v. *Hawker.* (5) It implies a right to let down the surface: *Thompson* v. *Mein.* (2) Express words are not required. The presence of the compensation clause is an important element in our favour: *Bell* v. *Earl of Dudley* (6); *Consett Waterworks Co.* v. *Ritson.* (1) It has been decided on a similar question on this very Act that the case depends upon the Act and not upon the custom of the manor, although it was the intention of the Legislature to put the bishop in the same position as he had been previously: *Gill* v. *Dickinson.* (7) There is nothing strange in the existence of this right to let down the surface. We are authorized to work quarries, and thereby to destroy the surface altogether. That shews that it is reasonable that we should have power to work mines and let down the surface without paying compensation: *Attorney-General* v. *Welsh Granite Co.* (8) This is an express contract, and is not a question of derogating from a grant: *Williams* v. *Bagnall.* (9)

(1) 22 Q. B. D. 318, 702; 64 L. J. (Ch.) 293, n.
(2) [1893] W. N. 202.
(3) 8 App. Cas. 833, 842, 843.
(4) (1842) 2 Q. B. 940; 57 R. R. 842.
(5) (1840) 7 M. & W. 63, 76; 56 R. R. 623.
(6) [1895] 1 Ch. 182.
(7) 5 Q. B. D. 159.
(8) 35 W. R. 617.
(9) (1867) 15 W. R. 272.

The Legislature intended to put the lord in the same position as he was in before the Act, and that he should not be liable to give compensation. The only thing which before the Act prevented him from letting down the surface is gone. The compensation clauses were introduced to provide a remedy for the inconvenience which would be caused by subsidence.

[VAUGHAN WILLIAMS L.J. You agree that primâ facie there is a right of support, and that to take away that right there must be either express words giving permission to withdraw the support or something in the instrument which has the same effect. A reservation of the right to get minerals is not of itself sufficient to have that effect. The authorities shew that an Inclosure Act which reserves to the lord the same power as he had before the Act, as if the Act had not been passed, will not by those words give the lord a right to let down the surface. Those words were present in *Bell* v. *Love*. (1) Then there are authorities which shew that provisions which by themselves are insufficient to have the effect may be sufficient if compensation for subsidence is provided for.]

We do not say that the compensation clause necessarily carries the right to let down the surface. But *Consett Waterworks Co.* v. *Ritson* (2) shews that such a reservation of minerals to a lord whose powers have hitherto been unfettered is sufficient, and any doubt is removed by the compensation clause. Farwell J. relied on *New Sharlston Collieries Co.* v. *Earl of Westmorland* (3), but even in that case it was held that a compensation clause must be taken into consideration.

The right to destroy the surface by working underneath and by working from above depends upon the same principle: *Hext* v. *Gill*. (4) Primâ facie the mineral owner can do neither: *Dalton* v. *Angus* (5); but the existence of a

(1) 10 Q. B. D. 547, 550.
(2) 22 Q. B. D. 702; 64 L. J. (Ch.) 293, n.
(3) See note at end of case, p. 443.
(4) L. R. 7 Ch. 699, 713.
(5) (1881) 6 App. Cas. 740, 791.

C. A. 1904

BISHOP AUCKLAND INDUSTRIAL CO-OPERATIVE SOCIETY, LIMITED v. BUTTERKNOWLE COLLIERY COMPANY, LIMITED.

compensation clause referable to this particular head of damage affords a strong argument that the right to let down the surface was intended. Farwell J.'s judgment is inconsistent with *Gill* v. *Dickinson* (1) and *Consett Waterworks Co.* v. *Ritson.* (2)

[They also referred to *Rowbotham* v. *Wilson* (3); *Earl of Cardigan* v. *Armitage* (4); *Dand* v. *Kingscote.* (5)]

Upjohn, K.C., and *O. L. Clare*, for the plaintiffs. Before the Inclosure Act the lord was owner of the soil and subsoil, and as owner was entitled, subject to the obligation of leaving a sufficiency of common of pasture, to let down the surface. After the inclosure the position was altered; the surface was then in the allottee, not in the lord at all, and when the lord goes on the surface he is really exercising a right of easement, or a right in the nature of an easement, and he must so exercise his rights as not to interfere with the substituted rights of the commoners: *Duke of Buccleuch* v. *Wakefield* (6); *Bell* v. *Love.* (7) No doubt the primâ facie right of the surface owner to support may be made to give way to evidence of a contrary intention, but the onus is on those who seek to set up the contrary intention. The contrary intention must be shewn by express words or by necessary implication. The words "searching for, winning, and working" do not extend to letting down the surface, even though coupled with a compensation clause, provided that effect can be given to those words without implying such a right. The power of searching, winning, and working is really a surface power. There are no words in this Act either expressly or by necessary implication giving the right to the lord to let down the surface, and the compensation clause is so framed as not to contemplate permanent damage, for the liability to compensate is thrown, not upon the owners, but upon the occupiers. This points to the clause being confined to surface operations.

(1) 5 Q. B. D. 159.
(2) 22 Q. B. D. 318.
(3) (1860) 8 H. L. C. 348.
(4) (1823) 2 B. & C. 197, 207; 26 R. R. 313.
(5) (1840) 6 M. & W. 174; 55 R. R. 560.
(6) L. R. 4 H. L. 377, 395–6.
(7) 10 Q. B. D. 547, 566.

Consett Waterworks Co. v. *Ritson* (1) is inconsistent with the observations of Lord Davey in *New Sharlston Collieries Co.* v. *Earl of Westmorland* (2) and the observations of Lord Selborne in *Love* v. *Bell* (3), and can only stand as a decision on the words of the particular instrument the Court had to construe. The existence of a provision for compensation does not necessarily authorize the mine owner to let down the surface: *New Sharlston Collieries Co.* v. *Earl of Westmorland* (2); the question is one of construction in each case.

[They also referred to *Harris* v. *Ryding* (4); *Smart* v. *Morton* (5); *Roberts* v. *Haines* (6); *Dugdale* v. *Robertson* (7); *Proud* v. *Bates* (8); *Davis* v. *Treharne.* (9)]

Danckwerts, K.C., in reply, was requested to confine his arguments to the question whether *Consett Waterworks Co.* v. *Ritson* (1) was consistent with the principles laid down by *Love* v. *Bell* (10) and with the law as laid down by *New Sharlston Collieries Co.* v. *Earl of Westmorland* (2), so as to be still a binding authority on the question raised by the appeal.

Cur. adv. vult.

July 15. VAUGHAN WILLIAMS L.J. It is unnecessary to recapitulate the facts of this case, which are so clearly stated at the beginning of the judgment of Farwell J. The keynote of the law which controls the relations of surface owners and mineral owners is as stated by Lord Halsbury in *New Sharlston Collieries Co.* v. *Earl of Westmorland* (2)—namely, that "the mere fact of giving a right to sink pits and to work or get coal does not of itself establish a right to get rid of the common law right of the surface owner to have his surface undisturbed." This law does not exclude the obligation of the Court to ascertain the meaning of the parties to a contract, whether such contract is embodied in an Act of Parliament or

(1) 22 Q.B.D. 702; 64 L. J. (Ch.) 293, n.
(2) See note at end of case, p. 443.
(3) 9 App. Cas. 289.
(4) (1839) 5 M. & W. 60; 52 R. R. 632.
(5) (1855) 5 E. & B. 30.
(6) (1856–7) 6 E. & B. 643; 7 E. & B. 625.
(7) (1857) 3 K. & J. 695.
(8) (1865) 34 L. J. (Ch.) 406.
(9) 6 App. Cas. 460.
(10) 9 App. Cas. 286.

C. A.
1904
BISHOP AUCKLAND INDUSTRIAL CO-OPERATIVE SOCIETY, LIMITED v. BUTTERKNOWLE COLLIERY COMPANY, LIMITED.
Vaughan Williams L.J.

not, but the "letting down" of the surface by underground workings is so injurious to the user of the surface by the surface owner, that it is not reasonable to construe a contract as giving the mineral owner this right unless the words of the contract make this plain, either by express words or by implication. The surface owner has by common law a right to have the surface supported by the subjacent lands. It is not reasonable to suppose that the surface owner intends to give up a right so important for the "user" of the surface without adequate consideration, and the Courts do not easily come to the conclusion that it is the intention of a contract to give up this right to support, and therefore, in construing a contract intended to determine the relative rights of the surface owner and the owner of the subjacent land, it is fitting to take into consideration, not only the words of the contract, but the nature of the right which it is sought to say the contract intends that the surface owner shall surrender. In this case there are no express words giving a right to the mineral owner to let down the surface, so it becomes necessary to see if the words of the contract embodied in the Act of Parliament are such as to make it plain that it was the intention of the parties thereto that the surface owner should surrender the right of support. Now, in construing the contract one must look at the contract as a whole, and if there are some words or provisions which favour the intention to displace the surface owner's right to support of the surface, and other words or provisions which go against the displacement, the Court ought not to find the intention of the parties to be that the surface owner is to surrender the right of support unless such intention is made plain, notwithstanding the words or provisions to be found in the contract going to negative this intention. There have been in the last few centuries many Inclosure Acts passed more or less on the lines of the Act we now have to consider, and, as one might expect, the weight to be given, in finding the intention of the parties, to the presence or absence of particular words or provisions has often been discussed, with results which have not always been very easy to reconcile. Take, for instance, the presence or absence of a provision for

compensation for damage done by the mining operations of the owner of the minerals. It is tolerably clear, from the decisions of the House of Lords in the cases of *Duke of Buccleuch* v. *Wakefield* (1) and *Love* v. *Bell* (2), that the noble Lords who took part in those cases thought the presence or absence of a provision for compensation of great importance in dealing with the question of intention and construction, and, moreover, thought that the presence of a provision for compensation favoured a construction against the continuation of the surface owner's right of support after the contract should take effect. These views are, however, not easy to reconcile with Lord Davey's observations in *New Sharlston Collieries Co.* v. *Earl of Westmorland* (3), where he says he does not accede to the argument that the existence of a covenant for payment of compensation for letting down the surface is, whether it applies wholly or partially to underground operations or not, in any way inconsistent with the continuance of the common law obligation. He says: "It does not seem to me to give a licence to do the injury, if you say that a person shall pay compensation if he does it." With regard to the present case, I will look first at the powers granted or reserved (I cannot think myself that on the present question of construction it matters much which) to the mineral owner. I do not think that the words of the powers taken by themselves, as they appear in the Act, extend to letting down the surface. I think that the powers reserved or granted are reserved or granted subject to the obligation which existed before the statutory contract came into operation and continued after it came into operation—"Sic utere tuo ut alienum non lædas." Then we come to the compensation clause. Does one find words or provisions in that clause which ought, when read in conjunction with the powers clause, to make one give a wider construction to that clause and read words which would not naturally have that effect as conferring on the mineral owner the right to let down the surface, paying compensation therefor? It is said that this is the proper construction because the compensation extends to the great damage

(1) L. R. 4 H. L. 377. (2) 9 App. Cas. 286.
(3) See note at end of case, p. 443.

C. A. 1904

BISHOP AUCKLAND INDUSTRIAL CO-OPERATIVE SOCIETY, LIMITED v. BUTTERKNOWLE COLLIERY COMPANY, LIMITED.

Vaughan Williams L.J.

to be done to particular persons by reason of searching for, winning, and working the mines and quarries within and under their respective allotments by the Lord Bishop of Durham, his successors and assigns, without making or paying any satisfaction for so doing; and it is further said, and truly said, that Lord Esher and Lindley L.J. both held in the *Consett Case* (1) that "letting down" the surface is almost inevitably the only damage which could be done by working the mines. Thus Lindley L.J. says: "As a practical question it is impossible to see what damage you could do to the surface in the ordinary course of working a mine under it, except by letting it down." It is argued that this Court is bound by reason of its own earlier decision in the *Consett Case* (1) to hold that the necessary effect of a compensation clause, coupled with the words "without making or paying any satisfaction for so doing," if it extends to working under the surface, is to give the mine owner a right to let down the surface. But it seems to me that all that the Court of Appeal were doing in the *Consett Case* (1) was to construe those words in that case, and that we are not bound to put the same construction in this case if we find matters in the present statutory contract which were not present in the *Consett Case* (1) going to negative the intention to give the lord a right to let down the surface. Before calling attention to these differences, I would like to call attention to the fact that Lord Esher, at all events, gave his judgment upon the basis that the presence of a compensation clause takes away the fetter put upon the Courts as to construing "large words," and makes it the duty of the Court to construe "large words" according to their ordinary effect. I do not think that this view is in accordance with the decisions in the House of Lords. It may be that the presence of a "compensation clause," especially where the compensation is to come from others than those who do the act for which compensation is to be made, is a matter to which considerable weight ought to be given on a question of construction, but I cannot think that there is no fetter on construction left. The presumption in favour of the common law right of support

(1) 64 L. J. (Ch.) 293, n.

should still prevent the Court from construing "large words" as freely as if no such presumption existed. Now the words of the compensation clause in the present Act are as follows: [His Lordship read the clause, and continued:—] It appears, therefore, that any person who suffers damage in his allotment by the "searching for, winning, and working of the mines and quarries therein," or by the laying or repairing of wagon-ways, and a number of other matters (the damages resulting from which last-mentioned causes would be obviously small), is to complain to one or more justices, who are to inquire into the compensation in a summary way and to finally settle and determine the damages sustained by such person, which damages are to be borne by the occupiers of the several allotments rateably in proportions to be fixed by the justices, with a liability to distress in default of payment. It will be observed that the damages from whatever cause are to be paid by the occupiers, not by the owners and proprietors of the allotments, who are mentioned a few lines later, and that the summary inquiry before the justices to finally settle the damages recoverable from the occupiers by distress seem very unsuitable to the fixing of large damages, but suitable rather to the recovery of small damages. Compare s. 48 of the Consett Act. It is true you find the same collocation of damages from various causes, but these damages are to be paid primarily, not by the occupants, but from a fund resulting from the rents of lands allotted to justices as trustees for the very purpose of providing compensation to persons injured by the working of the mines. It is true that there is in s. 49 a provision that if the fund formed by the clear rents and profits is deficient, the deficiency may be recovered from the owners or occupiers of all the several allotments rateably in proportion to value, and may be recovered by distress, but it is provided "that every occupier or tenant who shall have paid such damages as aforesaid shall and may deduct and retain out of his or her rent or rents so much money as he or she shall so pay." I am not saying that mere inadequacy of the statutory compensation would justify a limitation of the "large words" of definition of damages, but I think that the consideration of the class of persons on whom

C. A. 1904 BISHOP AUCKLAND INDUSTRIAL CO-OPERATIVE SOCIETY, LIMITED v. BUTTERKNOWLE COLLIERY COMPANY, LIMITED. Vaughan Williams L.J.

the liability to pay the compensation is thrown may make it right to put a narrow meaning on the words defining the damages for which compensation is to be given. With regard to the *Consett Case* (1) itself, I am not sure that it is consistent with the observations of Lord Davey in *New Sharlston Collieries Co.* v. *Earl of Westmorland* (2), to which I have already called attention. It clearly would not be consistent with those observations but for the differences in the sources from which the compensation is to be paid. It may be, however, that Lord Davey's observations as to the payment of compensation, rather importing that the thing the doing of which is to be compensated for is wrong than that it is right, only apply where the compensation is paid by the person doing that act. Be this how it may, it seems to me that the finding of Lord Esher that the only damage which could be done by the underground working would be by causing a subsidence of the surface does not bind us to-day, because it is a finding of fact in a particular case arrived at by consideration of the words of a particular instrument which had to be construed in that case, and is not a judgment laying down a canon of construction. I can conceive myself injuries which might be caused by underground working other than "letting down the surface." It seems to me that underground working might affect the springs and streams and wells on the surface, and I am not sure that underground working might not affect the surface or the buildings on the surface by vibration, without actually letting the surface down. The case is near the border-line; but I am not prepared to hold that the terms of the compensation clause are sufficiently plain and unequivocal to make it right that we should hold that there is by necessary implication power given to the mineral owner to let down the surface in a case in which there is no express power, and the general powers construed by themselves would not include such a power. I think the decision of Farwell J. ought to be affirmed.

ROMER L.J. I have felt great doubt about this case, chiefly because of certain passages in the judgments of the Court of

(1) 64 L. J. (Ch.) 293, n. (2) See note at end of case, p. 443.

Appeal in *Consett Waterworks Co.* v. *Ritson* (1), a case which, in certain of its features, has a great similarity to the present. The principle on which an allotment Act such as we have to consider here ought to be construed is clear. The surface owner has presumably a right of support, and that right can only be taken away when the Act does so necessarily or by plain indication; or, as Baggallay L.J. said in *Bell* v. *Love* (2), "It is essential that the intention of the Legislature should be expressed in language as to which there can be no reasonable question or doubt," and general powers of working conferred by the Act on the mine owner, however large, will not be held to take away the right of support if the general powers are not inconsistent with the right. As the Lord Chancellor put it with reference to a colliery, in *New Sharlston Collieries Co.* v. *Earl of Westmorland* (3), "the mere fact of giving a right to sink pits and to work or get coal does not of itself establish a right to get rid of the common law right of the surface owner to have his surface undisturbed." Applying this principle of construction to the case before me, the conclusion I have come to is that the Act in question, construed as a whole, does not clearly take away from the surface owners their right of support, and that, accordingly, the decision of Farwell J. must be affirmed. The passages in the judgments in the *Consett Waterworks Co.* v. *Ritson* (1), referred to above, must be construed with reference to the special provisions of the Inclosure Act which the Court had there to deal with.

Having thus stated the conclusion I have come to, I need only consider the provisions of the Act in the present case, and make a few brief observations on some of the more important clauses.

And, first, as to the reservations and powers in favour of the Bishop of Durham, his successors and assigns. [Having read the words of the Act as to these, his Lordship continued:—]

These words, no doubt, mention large reservations and powers. But they are general, and can be given effect to consistently with the allottees having the right of support. Such

(1) 64 L. J. (Ch.) 293, n. (2) 10 Q. B. D. 562.
(3) See note at end of case, p. 443.

C. A. 1904 BISHOP AUCKLAND INDUSTRIAL CO-OPERATIVE SOCIETY, LIMITED v. BUTTERKNOWLE COLLIERY COMPANY, LIMITED. Romer L.J.

reservations and powers cannot be distinguished in substance from the reservations and powers in the Act considered in *Bell* v. *Love* (1), which were held not inconsistent with the surface owner having the right of support. The words at the end, "as fully and freely as he or they might or could have had and enjoyed the same in case this Act had not been made," are similar to those used in the Act considered in *Bell* v. *Love*. (1) And as pointed out by Baggallay L.J., and also in the House of Lords in that case, those words must be construed, bearing in mind the fundamental fact that the allotments have been made by the Act in favour of the surface owners, who have primâ facie the right to support. So far, then, I consider the present case covered by the decision in *Bell* v. *Love*. (1)

But then come the words: "And that without making or paying any satisfaction for so doing." And it is with reference to somewhat similar (though not identical) words in the Act considered in *Consett Waterworks Co.* v. *Ritson* (2) that some of the passages in the judgments occur which have occasioned me difficulty in the present case. I am bound to say that I cannot fully follow or appreciate the force of some of the observations in the passages in question. I cannot myself see why the words in question are not quite consistent with the surface owners having the right of support. The expression without making or paying any satisfaction "for so doing" means to my mind, after I find that "so doing" means doing something not involving the right to let down the surface, merely not making or paying any satisfaction for doing any of the acts authorized or enumerated, and is not dealing with or considering the act of letting down the surface. At any rate, that is the conclusion I come to in the present case, notwithstanding what was said in the *Consett Waterworks Co.* v. *Ritson*. (2)

That being so, all that remains for me to consider is the compensation clause. Again there are, I admit, some passages in the judgments in the *Consett Waterworks Co.* v. *Ritson* (2) with reference to the compensation clause there considered which have caused me considerable difficulty, for those judg-

(1) 10 Q. B. D. 562. (2) 64 L. J. (Ch.) 293, n.

ments are of the Court of Appeal, and would or might bind me if the compensation clause there had been identical with that in the present case. But the two clauses are not identical. I need not enumerate the differences. Some of them have been already referred to by the Lord Justice in his judgment just delivered. And all I need say is, after a careful consideration of the compensation clause in the present case, that the Legislature has not made it clear that it was contemplating compensation for damage arising from letting down the surface. The words: "searching for, winning, and working the mines and quarries within and under their respective allotments" are quite general, and I cannot gather from the use of the word "working" (a very general word and of large import), even coupling it expressly with the word "under" the allotments, that the Legislature must have contemplated damage arising from letting down the surface. And this view is fortified by the provision that the persons who have to pay the conpensation are only "occupiers" of the allotments, and moreover occupiers excluding the occupier of the allotment damaged.

The result is that in my opinion the appeal must be dismissed.

COZENS-HARDY L.J. concurred.

Solicitors: *Meredith, Roberts & Mills, for G. W. Jennings, Bishop Auckland; Milles, Jennings-White & Foster.*

W. C. D.

NOTE.

April 3, 1900.

[House of Lords.]

NEW SHARLSTON COLLIERIES COMPANY, LIMITED, Appellants *v.* EARL OF WESTMORLAND, Respondent.

THIS was an action brought by the plaintiff, who was the owner of surface lands in the township of Sharlston and elsewhere in the West Riding of the county of York, to restrain the defendants from working the coal and other minerals so as to let down the surface. The defendants were working the coal under a lease from John Crossley & Sons, Limited, who were entitled to the minerals under a conveyance dated June 24, 1865, whereby the then Dowager Countess of Westmorland granted to the company, in consideration of 26,500*l.*, "all and every the mines veins and seams of coal iron and other ores as well

C. A.
1904
BISHOP AUCKLAND INDUSTRIAL CO-OPERATIVE SOCIETY, LIMITED v. BUTTERKNOWLE COLLIERY COMPANY, LIMITED.

opened as unopened lying and being within and under" the lands in question. This deed contained the following powers of working:—

"Together with full and free liberty power and authority to make sink and work all such pits shafts drift-levels drains aircourses water-gates and watercourses and to make lay place use and repair all such pits hills tram roads railways wagon and other ways including all existing pits now used by Messrs. Pope & Baines (lessees of part of the minerals whose rights the company had acquired) and to take and use all such heap room and ground room and to make erect and repair all such wharves staiths steam and other engines workmen's cottages stables stores buildings works and machinery whatsoever in under upon through over or along the same lands and hereditaments or any part thereof and to do all such acts as may be deemed necessary or convenient for working searching for getting raising stacking dressing burning into coke and carrying away not only the same mines veins and seams of coal iron and other ores to be gotten or raised therefrom or any part thereof but also under the outstroke rent hereinafter provided for all or any other coal iron or other ores of which the company their successors or assigns or their lessees or tenants may for the time being be the owners owner or lessee or lessees [then followed a power to dig clay to make bricks for certain limited purposes] and also with full power and authority to construct make maintain and do all other works and things which may be necessary or convenient for the purposes aforesaid or any of them doing as little damage as may be consistent with the due and proper carrying on of the said works."

The indenture also contained the following covenant by the company and compensation clauses:—

"That they the said company their successors or assigns will not sink or suffer to be sunk or driven any pit shaft drift or level which shall or may weaken damage injure or endanger any buildings belonging to the said vendor her heirs or assigns for the time being erected in or upon any of the said lands or sink any pit or shaft or place or lay any tramroad railway wagon or other way or make any pit-heap spoil-bank clayhole brickyard or other works in or upon any such building or within or upon any garden or orchard belonging thereto or within twenty yards from such building.

"And also that the company their successors and assigns will yearly make to the vendor her heirs and assigns satisfaction for the use and occupation of and for the spoil or damage or injury done or occasioned to in or upon the said lands by the searching for getting raising stacking dressing burning into coke and carrying away of the said coal or any part thereof or by the sinking or working of any pit or shaft or by the making or using of any pit hill or by the making erecting laying building or repairing of any tramroad railway wagon or other ways steam or other engines or machinery or digging or getting any clay or making or burning the same into bricks or otherwise by virtue of or under the liberties privileges and powers hereinbefore expressed to be hereby granted to the said company their successors or assigns such satisfaction to be estimated and fixed after the rate of double rent and assessments of the lands so used or occupied as aforesaid or to in or upon which any spoil damage or injury shall be done or occasioned by any of the ways or

means aforesaid." Then followed provisions binding the company to level and make good surface and restore the lands so as to be fit for tillage, and pay a rent of 200*l.* an acre for all lands not so restored, to fill up pits and maintain fences, and the covenant continued:—

"And that the said company their successors or assigns will from time to time pay to the said vendor her heirs or assigns and the tenants or occupiers of the said lands full compensation for all damage or injury done or occasioned by the said company their successors or assigns upon or to the said lands or any erection or building thereon which the satisfaction of double rent and assessments and the sum of 200*l.* to be made and paid as aforesaid shall not cover or to the trees hay corn herbage grass or produce of such lands by reason of the exercise of any of the aforesaid liberties privileges and powers."

The appellants were working the colliery under a lease from John Crossley & Sons, Limited, dated May 1, 1874, which in effect gave the lessees the same powers of working as were granted to the lessors by the conveyance of June 24, 1865.

The action was commenced on December 7, 1896. It came on for trial before North J. on November 2, 1897. The evidence shewed that the general mode of working in Yorkshire at the date of the lease was what is known as the "bank and pillar system," which left pillars of coal to support the roof. The defendant company had worked on the modern system known as the "long wall system," by which all the coal is removed. There was a conflict of evidence as to which system caused most injury to the surface; but it was admitted that working on the long wall system must cause and had caused some subsidence of the surface. There was no proof of any substantial damage.

On December 20, 1898, North J. gave judgment in the action granting an injunction to restrain the defendants from working the coal or other minerals so as to cause subsidence of the surface, and ordered the defendants to pay the costs, but did not direct any inquiry as to damages: 79 L. T. 716.

The defendants appealed to the Court of Appeal, and on June 8, 1899, the appeal was dismissed with costs: 80 L. T. 846.

The defendants then appealed to the House of Lords, and the appeal now came on for hearing.

Warmington, *Q.C.*, *Upjohn*, *Q.C.*, (*Strachan*, *Q.C.*, and *O. L. Clare* with them), for the appellants, referred to *Smith* v. *Darby*, (1872) L. R. 7 Q. B. 716; *Aspden* v. *Seddon*, (1875) L. R. 10 Ch. 394; *Dixon* v. *White*, (1883) 8 App. Cas. 833; *Davis* v. *Treharne*, (1881) 6 App. Cas. 460; *Love* v. *Bell*, (1884) 9 App. Cas. 286; *Chamber Colliery Co.* v. *Twyerould*, July 20, 1893, H. of L. (not reported).

Phipson Beale, *Q.C.*, and *Roskill*, for the respondent, were not called upon.

EARL OF HALSBURY L.C. My Lords, there is one observation of the learned counsel with which I heartily agree, namely, that we must find out what is the meaning of the contract between the parties, whether it be by deed or a simple contract, by looking at the instrument; and, looking at the whole instrument in the present case, I am of opinion that there is no ground for the contention of the appellants.

My Lords, the state of the law is now, by the decisions which have been referred to, perfectly clear. The

C. A.
1904
BISHOP AUCKLAND INDUSTRIAL CO-OPERATIVE SOCIETY, LIMITED v. BUTTERKNOWLE COLLIERY COMPANY, LIMITED.

mere fact of giving a right to sink pits and to work or get coal does not of itself establish a right to get rid of the common law right of the surface owner to have his surface undisturbed. That is a plain proposition of law, and when one approaches the question from that point of view it is manifest that in each of the cases that have been referred to the learned judges were talking of the particular instrument they had then to construe, and their problem was to find out whether by the express language of the grant, or by that which might be construed to be the general effect and intent of the whole instrument, there was a power to interfere with that common law right. I do not think that those principles were so firmly established some ten or twenty years ago as they are now; but that is the proposition of law, and it must be applied to the particular instrument which the Court has to construe in each case.

In this instrument, my Lords, I confess I am wholly unable to find any such permission to let down the surface. One observation which lies very plainly before one is that there is no express permission to do it, and if the arrangement between the parties was that it was contemplated, it is not, as was pointed out, I think, in *Love* v. *Bell*, 9 App. Cas. 286, an immaterial circumstance that it is not mentioned when they are dealing with such a subject, and dealing with it in such a way, as would naturally suggest the question whether that is to be the state of relations between the parties—the lessor and lessee, or the vendor and vendee, as the case may be. The absence of such an express permission is not without its significance. Then we have to deal with the question whether upon the whole instrument we can discover from its language that the parties did contemplate giving the right to let down the surface. My Lords, I can find no such right here; and it appears to me that, applying the principle of *Davis* v. *Treharne*, 6 App. Cas. 460, and the long line of cases which have now settled the law, it would be a reversal of what has been so settled if your Lordships were to assume, or from anything that you can find in this deed to imply, a right to let down the surface. It appears to me that the law upon the question must now be regarded as settled, and, there being no express permission, the onus lies on the person who says he has a right to do it, to shew something in the instrument which gives him that right.

My Lords, in the case which has been more than once referred to, the last case in this House, *Chamber Colliery Co.* v. *Twyerould*, July 20, 1893 (not reported), I should have thought the language of the instrument was plain. I confess I do not follow my late lamented friend Lord Watson in speaking of it as a very nice question, because, as I say, when you once have the broad proposition that the grantees are to have every right which the owner of both the surface and the minerals (who now purports to grant that right), had, I should have thought the ordinary proposition that a person may do as he likes with his own would carry you the whole way. But, whether I am right in that commentary or not, undoubtedly the provision did exist, and my noble and learned friend Lord Watson pointed out that that provision, together with other provisions in the instrument, satisfied him that the right to let down the surface was given. It is enough to say that there is no such provision here, and nothing like it,

and nothing has been urged, as it appears to me, before your Lordships upon this instrument which would rationally and properly lead to the inference that that was the intention of the parties.

Under these circumstances I move that this appeal be dismissed with costs.

LORDS MACNAGHTEN and MORRIS agreed.

LORD DAVEY. My Lords, I entirely agree. The case has been so fully dealt with by North J., and in the Court of Appeal by the Lords Justices, and now by my noble and learned friend on the Woolsack, that I shall not give any reasons at length.

There is only one observation I wish to make, having regard to what has fallen from the Bar and what has been said in other cases. Speaking for myself, I cannot see why a covenant providing a particular measure or mode of obtaining compensation is in any way inconsistent with the existence of an obligation not to let down the surface, even though that covenant extends beyond the surface and is applicable also, or even exclusively, to underground operations. The use of the words "by reason of the exercise of the powers" does not seem to me to carry it any further, because it may apply to any incidental injury done—whether accidentally or wilfully makes no difference — whilst exercising the powers. It does not seem to me to give a licence to do the injury, if you say that a person shall pay compensation if he does it. A covenant to pay compensation for doing a thing which you are prohibited from doing is in no way contrary to or inconsistent with the continuance of the obligation not to do it. Indeed, one may go further and say that, if the thing notwithstanding the prohibition is done, there is no other means by which you can obtain a remedy for what is past (an injunction, of course, will not extend to the past) except by provision for payment of compensation. Therefore I do not accede to the argument that the existence of a covenant for payment of compensation for letting down the surface is, whether it applies wholly or partially to underground operations or not, in any way inconsistent with the continuance of the common law obligation.

LORDS BRAMPTON and ROBERTSON agreed.

Order of the Court of Appeal affirmed, and appeal dismissed with costs.

Lords' Journals, April 3, 1900.

Solicitors: *Debenham, Walker & Co., for Mason, Fernandes & Greaves, Wakefield; Horn & Francis.*

J. R. B.

C. A. 1904 Aug. 2, 4, 10.

In re BROWN & GREGORY, LIMITED.

SHEPHEARD *v.* BROWN & GREGORY, LIMITED.

[1901 B. 4792.]

ANDREWS *v.* BROWN & GREGORY, LIMITED.

[1901 B. 4847.]

Company—Debenture—Debenture-holder's Action—Transfer of Debentures—Claim by Company against Transferor—Registered Holder—Rights against Transferee—Trustee for Creditors.

APPEAL from a decision of Byrne J. (1)

The only question raised in this case, which was the further consideration of consolidated debenture-holders' actions, was whether one A. C. Palmer, as the registered holder of debentures in the company and as assignee of the assets of a firm of Samuel Smith & Co., was entitled to share in the distribution of a fund in court, without first paying or bringing into account a debt due to the company from the firm.

Byrne J. held that he could not do so.

Palmer appealed.

Norton, K.C., and *Hon. M. Macnaghten*, for appellant.

Rowden, K.C., and *Hon. T. Watson*, for respondents.

On the hearing of the appeal further evidence was adduced, and from this it appeared that Palmer was not the registered owner of the debentures.

THE COURT (Vaughan Williams, Romer, and Cozens-Hardy L.JJ.) accordingly dismissed the appeal, without prejudice to any application which Palmer might make, on the footing that he was not the registered owner of the debentures,

(1) [1904] 1 Ch. 627.

C. A.
1904
BROWN & GREGORY, LIMITED. *In re.* SHEPHEARD *v.* BROWN & GREGORY, LIMITED.
ANDREWS *v.* BROWN & GREGORY, LIMITED.

to the judge in the Court below to vary the certificate or to enforce any equitable rights which he might have. If the application should not be made by December 1, 1904, the appeal would be dismissed with costs. If the application should be made by that date, the costs of the appeal would be left to the discretion of the judge in the Court below.

Solicitors: *Collyer-Bristow, Hill, Curtis, Dods & Booth, for Stone, Simpson & Mason, Tunbridge Wells; James, Mellor & Coleman.*

H. C. R.

SHARPINGTON *v.* FULHAM GUARDIANS.

FARWELL J.
1904
July 5, 6.

[1903 S. 2439.]

Public Authority—Limitation of Time for Proceedings—Claim under Contract—Contract incidental to Public Duty—Poor Law Guardians—Limitation of Time for Payment—Claim incurred or become due—Amount to be ascertained by Arbitration—Public Authorities Protection Act, 1893 (56 & 57 *Vict. c.* 61)—*Poor Law* (*Payment of Debts*) *Act*, 1859 (22 & 23 *Vict. c.* 49).

The guardians of F. entered into a contract with S., a builder, for certain works required by them for the purpose of carrying out their public duties. The works were completed on May 3, 1901, and paid for in September of that year. S. then claimed an additional sum by way of damages for loss alleged to have been caused by negligence and frequent changes of plans on the part of the defendants. The contract contained an arbitration clause, and the plaintiff's claim was referred to arbitration in November, 1902. The defendants took two preliminary objections—(1.) that the claim was for neglect or default in the execution of the defendants' public duty, and proceedings had not been commenced within six months as required by the Public Authorities Protection Act, 1893, and (2.) that the amount claimed became due, if at all, on or before May 3, 1901, and by the Poor Law (Payment of Debts) Act, 1859, could only be paid within the half-year commencing March 30, 1901, or within three months afterwards. This action was brought for the determination of these two points of law:—

Held, (1.) that the plaintiff's claim was in respect of a private duty arising out of a contract, not for any negligence in performing a statutory or public duty, and the Public Authorities Protection Act did not apply; (2.) that the sum (if any) owing to the plaintiff did not become due

FARWELL J.

1904

SHARPINGTON v. FULHAM GUARDIANS.

within the meaning of the Poor Law (Payment of Debts) Act, 1859, until the amount was ascertained by arbitration according to the contract.

THE defendants in this action were the guardians of the poor for the parish of Fulham. They had entered into a contract in writing with the plaintiff for the execution of certain works at No. 9, Parsons Green, S.W. The contract was contained in three documents, namely, general conditions of contract and specification of works issued by the defendants in September, 1899, a tender made under these conditions by the plaintiff dated September 20, 1899, and an acceptance of tender by the defendants dated December 20, 1899. The works consisted in altering and adding to an old mansion-house to make a receiving house for children of paupers pending their removal to district or separate schools, and for children of parents who were in the workhouse but likely to remain there only for short periods. The provision of such a receiving house was within the statutory powers and duties of the defendants.

The contract contained elaborate provisions for the measuring by the contractor, under the supervision of the defendants' surveyor, of all altered, omitted, additional, or provisional works, and for fixing the value according to certain bills of quantities, and, if they should not apply, in such manner as the defendants' architect or measuring surveyor should think just, and for the payment of the contract price, after the addition of all charges for alterations and additions, and deduction of a proper amount for all omissions, in manner therein mentioned. The contract also contained an arbitration clause in the usual form, capable of being enforced by either party under the Arbitration Act, but which did not make arbitration a condition precedent to payment.

The works under the contract were started on February 12, 1900, and should, according to the contract, have been completed on July 12, 1900, but owing, as the plaintiff alleged, to the conduct of the defendants they were not actually completed till May 3, 1901. The works were then completed

to the satisfaction of the defendants' architect. The plaintiff's account for work actually done had been settled according to the contract at 5751*l.* 15*s.* 2*d.*, and this sum was paid in September, 1901. The plaintiff then claimed an additional sum of 1357*l.* 19*s.* for extra cost and loss caused by the delay, due, as he alleged, to the defendants' conduct.

On November 25, 1902, this claim was referred to arbitration according to the contract. An arbitrator was duly appointed, but when the case came before him the defendants raised the preliminary objection that no portion of the plaintiff's claim could as a matter of law be recovered from them. By agreement between the parties this action was brought for the determination by the Court of the preliminary question of law.

The statement of claim, after setting out the contract and stating the completion of the works and the payment, alleged, paragraph 4: "The work executed was, through the acts, negligence, or defaults of the defendants, and the extensive alterations and defaults made by the defendants, delayed for a period of thirty-six weeks over and above the contract time, after making due allowance for the extra work caused by the variations, and by reason of such acts, negligence, defaults, and alterations and changes great extra cost was incurred, and inasmuch as the ascertaining of the true amount due to the plaintiff (if his claim was valid) would involve a very lengthy and costly investigation, the said arbitration had been adjourned in order that the parties might agree upon some method by which the question at law might be first determined, and by agreement this action had been brought." The plaintiff claimed a declaration that he was entitled to recover from the defendants under the contract such an amount as should be awarded by the arbitrator in respect of the claim stated in paragraph 4.

The statement of defence alleged that the action would not lie because (1.) the acts of negligence and default complained of, if any, were committed before May 3, 1901, and proceedings were not commenced within six months of that date as required

FARWELL J. 1904 SHARPINGTON v. FULHAM GUARDIANS.

by the Public Authorities Protection Act, 1893 (1), and (2.) the debt due to the plaintiff from the defendants (if any) became due before the same date, and under the provisions of the Poor Law (Payment of Debts) Act, 1859 (22 & 23 Vict. c. 49), could only be paid within the half-year in which it became due, or within three months afterwards, or upon judgment in proceedings commenced within such period. (2) It was admitted for the purposes of this action that the accounts of the defendants

(1) The Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), provides (s. 1): "Where after the commencement of this Act any action, prosecution, or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, duty, or authority, the following provisions shall have effect:—

"(*a*) The action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect, or default complained of, or, in a case of a continuance of injury or damage, within six months next after the ceasing thereof."

(2) The Poor Law (Payment of Debts) Act, 1859 (22 & 23 Vict. c. 49), provides (s. 1): "With respect to any debt, claim, or demand, which may be lawfully incurred by or become due from the guardians of any union or parish, or the board of management of any school or asylum district, such debt, claim, or demand shall be paid within the half-year in which the same shall have been incurred or become due, or within three months after the expiration of such half-year, but not afterwards, the commencement of such half-year to be reckoned from the time when the last half-year's account shall or ought to have been closed according to the order of the Poor Law Commissioners or Poor Law Board: Provided that the Poor Law Board, by their order, may, if they see fit, extend the time within which such payment shall be made for a period not exceeding twelve months after the date of such debt, claim, or demand."

Sect. 4: "If any person claiming any debt or demand shall have commenced or shall hereafter commence proceedings in any Court of law or equity, or before any justice or other competent authority, within the time hereinbefore limited, or within the time to which the Poor Law Board may grant extension, and shall with due diligence prosecute such proceedings to judgment or other final settlement of the question, such judgment shall be satisfied by the guardians or managers against whom or against whose officer the same may be brought, notwithstanding that such judgment may be recovered or such final settlement arrived at after the expiration of the period hereinbefore provided, and all proceedings taken by mandamus or otherwise for the enforcing of such judgment without delay shall be deemed to be within the operation of this section."

for the half-year preceding May 3, 1901, were closed on March 30, 1901.

The defendants tried to raise the general question whether, on the construction of the contract and on the facts, the plaintiff was entitled to recover; but Farwell J. held that there was no admission of facts sufficiently definite to enable him to decide this question. The two points stated above were separately argued. On the first point—

Upjohn, K.C., and *Beddall*, for the plaintiff. The Public Authorities Protection Act does not apply. The defendants entered into the contract with the plaintiff in exercise of their statutory powers. But as soon as they had entered into it the rights of the parties were settled by the contract and the contract only. The plaintiff is not suing in respect of anything done or omitted to be done under the defendants' statutory powers or public duties, but for breach of their private duty to him under the contract.

In *Midland Ry. Co.* v. *Withington Local Board* (1) Brett M.R. says that the section of the Public Health Act, 1875, for which this Act was substituted did not apply in a case of specific contract. *Davies* v. *Swansea Corporation* (2) is an authority to the same effect; and Lord Ellenborough's judgment in *Wallace* v. *Smith* (3) shews that legislation of this kind was not intended to apply to actions of assumpsit.

The Act applies only to "any action, prosecution, or other proceeding"; it does not apply to proceedings before an arbitrator.

Butcher, K.C., and *A. A. Hudson*, for the defendants. *Fielding* v. *Morley Corporation* (4) is a clear authority that all kinds of proceedings are within the Act. The Act applies to public authorities when "acting in pursuance of trade or business which in private hands would be of a private character; and to contracts entered into in the course of doing anything they are authorized to do." It is so laid down by Sir F. H. Jeune in

(1) (1883) 11 Q. B. D. 788, 794.
(2) (1853) 8 Ex. 808.
(3) (1804) 5 East, 115, 122.
(4) [1899] 1 Ch. 1.

FARWELL J. 1904 SHARPINGTON v. FULHAM GUARDIANS.

The Ydun (1), which was affirmed by the Court of Appeal, and the proposition is supported by *Parker* v. *London County Council* (2); *Jeremiah Ambler & Sons, Ld.* v. *Bradford Corporation* (3); *Grand Junction Waterworks Co.* v. *Hampstead Urban Council* (4); *Toms* v. *Clacton Urban Council* (5); *Chamberlain & Hookham, Ld.* v. *Bradford Corporation.* (6)

The rule would not apply to a purely incidental contract, but it applies to every contract entered into for the direct object of carrying out their powers. In *Attorney-General* v. *Company of Proprietors of Margate Pier and Harbour* (7) the defendants were refused the protection of the Act only because they were a private company incorporated for the purpose of gain.

Upjohn, K.C., in reply. In all the cases in which the Act has been held to apply there has been a duty to the public binding the public body to do the act contracted for; that is clearly distinguishable from the duty to the plaintiff upon which he relies in this case: it is a duty to him privately arising out of the contract.

FARWELL J. (after stating the facts of the case and reading the 1st section of the Public Authorities Protection Act set out above). It is said that this breach of contract is a neglect or default in the execution of a public duty or authority within the section I have read. It is curious that no decision on the precise point has been found; but in my opinion this is an attempt to carry the effect of the Act much further than any case has ever before gone, and further than in my opinion it ought to be carried.

Public authorities now perform many functions which compel them to enter into all sorts of contracts; but this is the first time it has been suggested that on any construction the Act could apply to contracts of this nature. The defendants' counsel had not the courage to follow their argument to its logical conclusion, and say that every contract entered into

(1) [1899] P. 236, 240.
(2) [1904] 2 K. B. 501; (1904) 68 J. P. 239.
(3) [1902] 2 Ch. 585.
(4) (1899) 15 Times L. R. 412.
(5) (1898) 14 Times L. R. 474.
(6) (1900) 83 L. T. 518.
(7) [1900] 1 Ch. 749.

by a public body is within the Act. But every contract entered into by a public body is necessarily in a sense entered into in discharge of a public duty or under statutory authority, for otherwise it would be ultra vires. And I think it would necessarily follow, if I decided in the defendants' favour, that every contract entered into by a public authority is an act done in pursuance of a public duty or authority, and therefore is one to which the Act applies. I do not see where to draw the line.

The first case cited, *Fielding* v. *Morley Corporation* (1), does not, I think, touch the present case at all; it was an action for an injunction to restrain the corporation from allowing water to escape from their aqueduct and flood the plaintiff's land. The case of the *Ydun* (2) was an action against the corporation for negligence in managing the navigation of the Ribble, and the learned President says: "I cannot doubt that the corporation of Preston in carrying out under statutory authority its enterprise of the Ribble navigation, a water highway to Preston, acts as a public authority executing a public duty as much as when it makes or maintains the land highways within the ambit of the municipality." The action was for negligence in the discharge of that public duty. The case in the Justice of the Peace, *Parker* v. *London County Council* (3), may, I think, be explained in the same way. It was an action brought by a passenger against the county council for negligence in carrying passengers under their statutory powers. I do not think the decision in *Jeremiah Ambler & Sons, Ld.* v. *Bradford Corporation* (4) in any way affects the point in the case before me; but there is a suggestion at the end of Romer L.J.'s judgment that the Act only applies to an action "whose ground is an act done by the defendants directly in execution, or intended execution, of their public duty or authority," that would seem to shew that it would not apply to an action based upon a contract which was only incidental to their duty. In the last case cited, *Chamberlain & Hookham, Ld.* v. *Bradford Corporation* (5), the corporation were sued by patentees for

(1) [1899] 1 Ch. 1.
(2) [1899] P. 236, 240.
(3) [1904] 2 K. B. 501; 68 J. P. 239.
(4) [1902] 2 Ch. 585, 594.
(5) 83 L. T. 518.

FARWELL J. 1904 SHARPINGTON v. FULHAM GUARDIANS.

infringement of their patent for electric meters in carrying out the electric lighting of Bradford under statutory powers, and, the action having failed, the learned judge held that they were attacked in respect of something done in performance of their public duty, and gave them solicitor and client costs.

The present case seems to me quite different. The public duty which is here cast upon the guardians is to supply a receiving house for poor children; a breach or negligent performance of that duty would be an injury to the children, or possibly to the public, who might be injured by finding the children on the highway. In order to carry out this duty they have power to build a house or alter a house, and they accordingly entered into a private contract. It is a breach of this private contract that is complained of in this action. It is not a complaint by a number of children or by a member of the public in respect of the public duty. It is a complaint by a private individual in respect of a private injury done to him. The only way in which the public duty comes in at all is, as I have pointed out, that if it were not for the public duty any such contract would be ultra vires. But that would apply to every contract. I cannot find any ground for saying that this particular contract comes within the Act. I think it is clear that what is complained of is a breach of a private duty of the guardians to a private individual. The result is that, so far as this section is concerned, the action will lie.

July 6. On the second point—

Upjohn, K.C., and *Beddall*, for the plaintiff. Since the Court rose yesterday we have been referred to *National Telephone Co.* v. *Kingston-upon-Hull Corporation* (1), in which Buckley J. seems to have come to the same conclusion as your Lordship on the point decided yesterday.

The Act of 1859 refers to debts which the guardians could, and ought to, have paid within the time limited, not to such as could not have been paid because the amount was not ascertained in manner provided by law.

(1) (1903) 1 L. G. R. 777.

It has been held by the House of Lords and the Court of Appeal that where there is an order to pay costs the time does not begin to run until the costs are taxed: *Midland Ry. Co.* v. *Edmonton Union* (1); *West Ham Union* v. *Churchwardens of St. Matthew, Bethnal Green* (2); *Manchester, Sheffield and Lincolnshire Ry. Co.* v. *Doncaster Union.* (3) So in this case the claim is not payable until its amount has been ascertained by arbitration.

Butcher, K.C., and *A. A. Hudson*, for the guardians. In this case, by the contract between the parties, proceedings before the arbitrator were substituted for legal proceedings; but the arbitration proceedings were not commenced by the plaintiff within the time required by the Act. The demand made by the plaintiff is not for something which has to be ascertained as the price of work done; it is a sum claimed outside the contract by way of damages for the guardians' misconduct. The plaintiff has named a fixed sum, and there was nothing to prevent him commencing proceedings in the arbitration within the six months; he did not so do, and is therefore barred: *Baker* v. *Billericay Union* (4); *Reg.* v. *Stepney Union.* (5)

The cases quoted in the House of Lords were taxation cases, and were decided on the ground that there was no legal liability to pay until the costs were taxed; and in *West Ham Union* v. *Churchwardens of St. Matthew, Bethnal Green* (2), Lord Macnaghten's judgment shews that the case turned on the rules of the House of Lords. In this case the legal liability arose as soon as any damage was suffered; it did not depend on the arbitration. The clause in the contract does not make arbitration a condition precedent to payment.

FARWELL J. The question is whether the Poor Law (Payment of Debts) Act, 1859, is a bar to the plaintiff's claim. That Act has received judicial interpretation both in the House of Lords and in the Court of Appeal, and I think it follows from what they have laid down that neither the reference to arbitration, nor the claim sent by the plaintiff for the sum

(1) [1895] A. C. 485.
(2) [1896] A. C. 477.
(3) [1897] 1 Q. B. 117.
(4) (1863) 2 H. & C. 642.
(5) (1874) L. R. 9 Q. B. 383.

FARWELL J. 1904 SHARPINGTON v. FULHAM GUARDIANS.

mentioned, was a commencement of proceedings within s. 4 of the Act. The point seems to me to be concluded by the decision in *Midland Ry. Co.* v. *Edmonton Union.* (1) That was a case where there was an order for payment of costs and an application to tax was made within the specified time, but the actual taxation took place after the expiration of that time, and no proceedings to enforce payment were commenced even within the further period of three months after the expiration of the half-year during which the taxation was completed. It was held that the application to tax was not a commencement of proceedings within s. 4, on the ground that the proceedings referred to in that section must be such as would result in a final judgment. The application to tax the costs was merely a step to ascertain the amount. In my opinion that governs the present case, and neither the mere claim of a fixed amount nor the reference to arbitration was the commencement of proceedings within the meaning of s. 4.

The further question is whether this sum has become due within the meaning of s. 1 of the Act. In my opinion the House of Lords in the case of *West Ham Union* v. *Churchwardens of St. Matthew, Bethnal Green* (2), have conclusively determined the construction of the Act on this point. It was held there that an order of the House for the payment of the costs of an appeal, without specifying the amount, does not constitute a debt, claim, or demand within the meaning of that section; and Lord Herschell stated the grounds for the decision thus: "The first section was not designed, as Statutes of Limitation are, to prevent stale demands, though it may incidentally bar the remedy of creditors who delay asserting their rights. Both in form and substance it is an injunction on the guardians to discharge their obligations promptly. It provides that the debt, claim, or demand 'shall be paid' within the time limited. I think it must refer to debts which the guardians could and ought to have paid within the time limited, and not to such as could not properly be paid within that time, inasmuch as the amount had not been ascertained in the manner provided by law." "The manner provided by law"

(1) [1895] A. C. 485. (2) [1896] A. C. 477, 485.

there does not, in my opinion, mean a manner provided as a condition precedent, but a manner which either party can insist on, as in a case of taxation or reference to arbitration. Then his Lordship says: "In my opinion it was not until the certificate of the Clerk of the Parliaments was given that the statutory provision became applicable. I must not be understood as saying that if the amount of the debt or liability remained unascertained owing to neglect on the part of the guardians the case might not have a different aspect."

It was argued that Lord Macnaghten's judgment in that case shews that it turned on the practice of the House of Lords. But that argument is disposed of by the decision of the Court of Appeal in *Manchester, Sheffield and Lincolnshire Ry. Co.* v. *Doncaster Union* (1), in which it was held that a judgment of the Court of Appeal for payment by guardians of costs does not until taxation constitute a debt, claim, or demand lawfully incurred or become due within the meaning of this section. Lord Esher says in that case (2): "It is true to say that outside this Act of Parliament a judgment for costs enables the party in whose favour it is given to say that they are due, and to maintain an action for them." I read that because it was said in argument that that was not the case, "But within the meaning of this Act, where those who are ordered to pay costs are a board of guardians, they are not bound to pay till the costs are taxed; and that being so, the period from which the time limited is to run is not that at which judgment was given, but that at which they are bound to pay—that is, the time when the costs are ascertained by taxation"; and Rigby L.J. said (3): "The question that arises on such a case as the present is, to my mind, not whether an action could be brought to recover untaxed costs, or whether an order for costs has been made, but whether the circumstances are such that the guardians are under an obligation to pay."

I am of opinion, therefore, that this objection fails also.

Solicitors: *Booth & Smee; T. Blanco White.*

(1) [1897] 1 Q. B. 117. (2) [1897] 1 Q. B. 121.
(3) [1897] 1 Q. B. 122.

J. R. B.

FARWELL J.

1904

July 13.

In re PHILLIMORE'S ESTATE. PHILLIMORE *v.* MILNES.

[1904 P. 752.]

Settled Land Act — Compound Settlement — Deed granting Annuities — Settlement by Will of Grantor's Interest in Land subject to the Annuities.

By a deed dated August 3, 1886, certain real and leasehold property was assured to trustees upon trust for such persons as P. should by deed appoint. By deed dated August 4, 1886, P. appointed that this property should be held upon trust for himself for life, and subject thereto to pay certain annuities to five persons for their respective lives, and subject thereto in trust for P. absolutely. P. died in February, 1887, having by his will given his residuary estate, which included the interest he had retained in the property subject to the annuities, upon trusts equivalent to a strict settlement, under which the plaintiff was tenant for life and his infant son tenant in tail in remainder:—

Held, that the deeds of August 3 and 4, 1886, and the will formed a compound settlement under the Settled Land Acts, and that the plaintiff, as tenant for life under this compound settlement, could sell the property discharged from the annuities.

By an indenture dated August 3, 1886, certain leasehold and freehold hereditaments situate chiefly in London, of which W. B. Phillimore had absolute power to dispose, were assured to W. B. Phillimore and Robert Milnes as joint tenants upon trust for such persons and for such trusts, intents, and purposes as the said W. B. Phillimore should from time to time by deed appoint, and in default of appointment in trust for W. B. Phillimore, his heirs, executors, administrators, and assigns absolutely.

By deed-poll under his hand dated August 4, 1886, W. B. Phillimore appointed that the trustees should hold the said hereditaments upon trust to permit him, the said W. B. Phillimore, to receive the income during his life, and after his death to pay the annual sum of 700*l.* to A. B. during her life, she applying 200*l.* part thereof in the maintenance and education of her daughter, and after the death of A. B. to pay the said annuity to her daughter during her life, and after the

death of the survivor of W. B. Phillimore, A. B. and her daughter to raise by sale or mortgage of the same hereditaments a sum of 5000*l.*, and divide it equally between such of the children of the daughter, if any, as should attain twenty-one, or, being daughters, should marry under that age. He then appointed annuities in favour of three other persons for life of an aggregate annual value of 450*l.*, and directed that subject thereto the whole of the rents, profits, and issues of the said hereditaments should be held in trust for himself, the said W. B. Phillimore, his heirs, executors, administrators, and assigns absolutely. The deed-poll did not give the trustees any express powers of management.

W. B. Phillimore died on February 5, 1887, leaving no children, but having by his will, dated May 29, 1886, given all his residuary estate to trustees upon trust for sale and conversion, and to invest the proceeds and pay the income to his wife for life, and after her death to hold the capital and income in trust for his children in equal shares, and if none upon such trusts as his said residuary estate and the produce thereof would be held upon if the same were directed to be laid out in the purchase of real estate to be settled on the trusts following—that was to say, in trust for the Rev. George Phillimore for his life without impeachment of waste, with remainder in trust for his sons born in the testator's lifetime successively for life, with remainder to their respective sons successively in tail, with remainders over in strict settlement. The testator's interest in the freeholds and leaseholds comprised in the deeds of August 3 and 4, 1886, passed under this residuary gift. The will gave the trustees powers of leasing and management.

The testator made three codicils to his will which in no way affected the property comprised in the deeds of August 3 and 4, 1886; but the third codicil was dated December 1, 1886, after the date of those deeds, and confirmed the will.

New trustees of the deed-poll had been appointed after the testator's death.

The testator's wife survived him, and died on January 20, 1900. George Phillimore, in the will mentioned, died on

FARWELL J. 1904 PHILLIMORE'S ESTATE, *In re.* PHILLIMORE *v.* MILNES.

October 14, 1889, leaving the plaintiff Arthur Phillimore, his eldest son, him surviving. The plaintiff was the tenant for life of the testator's residuary estate, and his infant son was the first tenant in tail in remainder.

This summons was taken out by the plaintiff, asking for a declaration that the indenture of August 3, 1886, the deed-poll of August 4, 1886, and the will together constituted a settlement within the meaning of the Settled Land Acts of the estates comprised in the said indenture, and that the plaintiff was tenant for life of the said estates under the said settlement, and that trustees might be appointed of the said estates for the purposes of the Settled Land Acts, and the plaintiff might be authorized to exercise the powers of sale and leasing conferred on tenants for life by the said Acts, and let into possession of the estates.

Upjohn, K.C., and *Gent*, for the plaintiff. The whole of these deeds form one settlement within the meaning of the Settled Land Acts. The case is clearly within *In re Marquis of Ailesbury and Lord Iveagh* (1), which was approved by the Court of Appeal in *In re Mundy and Roper's Contract.* (2) There are persons entitled in succession under this series of deeds. The deeds are quite as much connected as those in the *Ailesbury Case* (1); and if they are not within the Act it is a blot on the Act, for a man can always take his settled property out of the Act by granting a few annuities. In *Attorney-General* v. *Owen* (3) and *In re Campbell* (4), which were revenue cases, the facts were exactly the same as in this case.

Marcy, for the infant tenant in remainder.

Kirby, for the trustees of the will.

Jenkins, K.C., and *A. àB. Terrell*, for the trustees of the deeds of August 3 and 4, 1886. The object of the deeds of August 3 and 4, 1886, was merely to charge the annuities on the estate, which was the absolute property of W. B. Phillimore. The date of W. B. Phillimore's death is the time which must be looked at to see if there is a compound settlement or

(1) [1893] 2 Ch. 345.
(2) [1899] 1 Ch. 275.
(3) [1899] 2 Q. B. 253.
(4) [1902] 1 K. B. 113.

not. At that date there was no tenancy for life under the deed of August 4; the estate was owned by the testator absolutely, subject to the incumbrance of the annuities which he had created, and it was settled by his will. The will is the settlement, the annuities are mere prior charges. It was not the intention of the Settled Land Act to enable a landowner to make charges upon his land and then override them by a subsequent settlement.

In *In re Mundy and Roper's Contract* (1) and in the *Ailesbury Case* (2) the deeds formed part of a series creating successive settlements. In the two revenue cases the annuities were created by the same wills which created the settlement. In all the cases there was some connection between the deeds; here there is none. A mere charge upon settled property does not necessarily create a compound settlement: *In re Du Cane and Nettlefold's Contract.* (3)

FARWELL J. In my opinion this case is governed by the *Ailesbury Case.* (2) That decision has been approved by the Court of Appeal (1), and I ought not to fritter away the broad principle laid down in that decision by drawing subtle distinctions and differences, especially as to do so would only shew that there is a blot in the Act of which advantage might be taken to defeat its object.

The facts of the present case are these. The late Captain Phillimore, being the owner in fee of certain freeholds and absolutely entitled to certain leaseholds, declared trusts under which he made himself tenant for life with trusts in remainder to pay certain annuities, and subject thereto for himself absolutely; that is obviously a settlement within the meaning of the Act. He then by codicil confirmed a will by which he disposed of his ultimate interests, subject to the annuities which he had voluntarily created by the settlement. He dealt with the property left in him under the settlement and disposed of it by making the present applicant tenant for life with remainders over. In the *Ailesbury Case* (2) Stirling J. held

(1) [1899] 1 Ch. 275. (2) [1893] 2 Ch. 345.
(3) [1898] 2 Ch. 96.

FARWELL J. 1904 PHILLIMORE'S ESTATE, *In re.* PHILLIMORE *v.* MILNES.

that the then tenant for life of the Ailesbury estate, whose title was derived under a resettlement of 1885, could dispose of the land freed from a jointure created under the powers of deeds of 1796 and 1826, which formed part of the series of resettlements, though there had been regular disentailing deeds and resettlements in 1863 and 1885. That case was approved by the Court of Appeal in a subsequent case, notwithstanding the comments of some learned writers in the interval. And it seems to me that if the connection between the deeds was sufficient in that case, much more is the connection between the deeds in the present case sufficient. As Chitty L.J. said in *In re Mundy and Roper's Contract* (1), referring to the judgment of Stirling J. in the *Ailesbury Case* (2): "He held that the Savernake estate stood limited to uses in favour of various persons by way of succession under or by virtue of the series of deeds, and that the Marchioness Maria was one of the persons taking under the series of deeds, although she did not take by way of succession to the vendor. This was a broad view of the Act; but I repeat that, in my opinion, it was the right view."

In my opinion the present case presents less difficulty than that case, and is governed by the principle there laid down; and I am certainly not disposed to explain away that principle. The plaintiff must have leave to exercise the powers given him by s. 63 of the Settled Land Act, 1882; and he may be let into possession upon giving a proper indemnity to the trustees.

Solicitors: *Burgoynes & Greatbach; J. R. Hall; Nicholson, Patterson & Freeland.*

(1) [1899] 1 Ch. 275, 295. (2) [1893] 2 Ch. 345.

J. R. B.

In re CLABBON (AN INFANT).

FARWELL J.

1904

July 27.

[1904 C. 41.]

Pauper—Infant—Expenses of Maintenance—Arrears—Right of Poor Law Guardians to recover against Property of Infant—Poor Law Amendment Act, 1849 (12 & 13 *Vict. c.* 103), *s.* 16.

The rule that, where necessaries are supplied to a person who from any disability cannot himself contract, the law implies an obligation to pay for them out of his property extends to the case of an infant pauper supported by guardians in discharge of their statutory duty. This liability is not cut down by the Poor Law Amendment Act, 1849, s. 16, which gives special means of recovering one year's maintenance; and the guardians can therefore recover six years' arrears of moneys expended for the maintenance of an infant pauper.

On June 29, 1897, Frederick William Clabbon, an infant, became chargeable to, and was taken charge of by, the guardians of the poor of the parish of St. Mary, Islington, who boarded him out at Petworth, in Sussex, for 5*s.* a week. Under the will of his grandfather William Clabbon, who died on July 5, 1903, the infant became entitled to a legacy of 100*l.*, and a one-third share of the testator's residuary estate, which consisted of 503*l.* Consols.

The clerk of the guardians took out an originating summons dated January 5, 1904, as next friend of the infant, against the executor of William Clabbon's will, asking that a sum of 83*l.* 9*s.* might be paid by the executor to the guardians in respect of the infant's maintenance from June 29, 1897, to November 16, 1903; and that a sum of 5*s.* a week might be allowed for maintenance of the infant from that day until he attained his majority.

The executor had made arrangements for the future maintenance of the infant, and it had been agreed that the question as to the claim of the guardians for past maintenance should be determined on this summons without any question being raised as to the form of the proceedings.

The only question was whether the guardians were entitled to the money expended for maintenance within six years, or

FARWELL J. 1904 CLABBON (AN INFANT), *In re.*

only to the money so expended within twelve months which is specially given by the Poor Law Amendment Act, 1849. (1)

S. Davey, for the clerk to the guardians. The general principle is laid down in *In re Rhodes* (2): "Whenever necessaries are supplied to a person who by reason of disability cannot himself contract, the law implies an obligation on the part of such person to pay for such necessaries out of his own property."

There do not seem to be any decided cases under the Poor Law Acts relating to infants, but expenses incurred by the guardians in taking care of a person suffering from delirium tremens have been recovered under the general common law liability: *West Ham Union* v. *Pearson*. (3) If there is a common law liability, the only question is whether it is cut down by s. 16 of the Poor Law Amendment Act, 1849, and there is nothing in that section which could possibly cut down a common law liability.

R. M. Pattisson, for the executor. Where guardians are claiming for necessaries supplied to a pauper, they can only claim under the statute. They do not supply the necessaries under any implied contract with the pauper, but under the liability imposed upon them by a succession of statutes. The pauper has a right to be relieved under these statutes quite independently of any implied contract. If the guardians have

(1) 12 & 13 Vict. c. 103, s. 16, provides as follows: "Where any pauper shall have in his possession or belonging to him any money or valuable security for money, the guardians of the union or parish within which such pauper is chargeable may take and appropriate so much of such money or the produce of such security, or recover the same as a debt before any local Court, as will reimburse the said guardians for the amount expended by them, whether on behalf of the common fund or of any parish, in the relief of such pauper, during the period of twelve months prior to such taking and appropriation, or prior to such proceeding for the recovery thereof (as the case may be); and in the event of the death of any pauper having in his possession or belonging to him any money or property, the guardians of the union or parish wherein such pauper shall die may reimburse themselves the expenses incurred by them in and about the burial of such pauper, and in and about the maintenance of such pauper at any time during the twelve months previous to the decease."

(2) (1890) 44 Ch. D. 94.

(3) (1890) 62 L. T. 638; 54 J. P. 645.

any right to repayment out of the pauper's property, it can only be such as is given them by statute.

It has been held in two cases—*In re Webster* (1) and *In re Newbegin's Estate* (2)—that guardians could recover six years' arrears in the case of lunatics; but these cases turned wholly on the form of the Lunatic Asylums Act, 1853 (16 & 17 Vict. c. 97), and Chitty J. expressly said that only one year's arrears could be recovered under this Act.

FARWELL J. In my opinion the case is covered by the authorities cited by Mr. Davey. I cannot agree that a pauper, who takes relief in the shape of necessaries which keep him alive, takes that relief so entirely of right that he is not under a legal liability to pay if he afterwards comes into money. The case is within the decision of *West Ham Union* v. *Pearson* (3), where Fry L.J. says: "The question here is whether the defendant is liable for these expenses, expenses which were properly incurred for the benefit of the defendant. I think he is so liable, and I base my decision, not upon the Lunacy Acts, but simply upon the common law liability on the part of the defendant to repay the expenses necessarily incurred for the benefit of the defendant himself." And Mathew J. said: "I am of the same opinion. It has been abundantly proved here that this man was not in a fit state to protect himself, that these expenses were necessaries, and that therefore the defendant is liable for them." This common law liability extends in all cases, including that of an infant, to six years' arrears of maintenance. Then comes the question whether s. 16 of the Poor Law Amendment Act, 1849, has cut down that liability to maintenance for one year. It is difficult to imagine why it should, and I cannot read the section as having any such operation; its object is to give the guardians additional security by way of charge on any money a pauper may have, and to give the guardians power to recover the arrears in a summary manner. It does not purport to affect common law rights in any way, and it would need express

(1) (1884) 27 Ch. D. 710. (2) (1887) 36 Ch. D. 477.
(3) 62 L. T. 638; 54 J. P. 645.

FARWELL J. 1904 CLABBON (AN INFANT), *In re.*

words to put a limit on a common law liability. If it had not been for the dictum of Chitty J. in *In re Newbegin's Estate* (1) I should not have thought there was much doubt about the matter. But the case before Chitty J. was not under this Act, and the dictum was not necessary for its decision. It is not binding on me, and I cannot follow it. I must authorize the executor to pay to the guardians six years' arrears of maintenance, to be reckoned from to-day, for these proceedings are not taken by the guardians within the meaning of the section.

Solicitors: *Samuel Price & Sons; Crossfield, Cushing & Wheldon.*

J. R. B.

BUCKLEY J. 1904 *June* 21, 28.

In re RANDT GOLD MINING COMPANY.

[00151 of 1901.]

Company — Winding-up — Contributory — Forfeited Shares — Right of present Member to Credit for Payment of Calls made before Forfeiture — Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 38.

Where a company in pursuance of its articles of association has forfeited shares for non-payment of calls, and the articles provide that notwithstanding forfeiture the ex-shareholder shall be liable to pay the amount of the calls, and the shares are subsequently reallotted to another person, that person is entitled on the winding-up of the company to be credited with all sums paid by the previous holder, whether in respect of moneys paid by him as a shareholder in respect of the shares, or as a debtor in respect of his liability under the articles to pay calls notwithstanding forfeiture.

THE Randt Gold Mining Company, Limited, was incorporated in 1895 with a capital divided into shares of 5*s.* each.

In April, 1900, a company called the African Gold Properties, Limited, held 40,000 shares in the Randt Company upon which 3*s.* 4*d.* per share had been paid. The remaining 1*s.* 8*d.* per share had been called, but the African company failed to pay the call, and by a resolution of the Randt Company dated April 18, 1900, the 40,000 shares were forfeited. The result was that by clause 16 of the articles of association of the Randt

(1) 36 Ch. D. 477, 485.

Company the shares were to be deemed to be the property of the Randt Company, and the directors of that company might sell them as they thought fit.

Under art. 17 the African Company remained after forfeiture of the shares liable to pay all calls owing upon or in respect of the same at the time of forfeiture with interest.

The directors sold the 40,000 shares to the New Balkis Eersteling, Limited, for 150*l.*, and gave that company a certificate in the following form:—

"The Randt Gold Mining Company, Limited.

"Certificate.

"This is to certify that the New Balkis Eersteling, Limited, ... is the holder of 40,000 shares of five shillings each . . . . in the above-named company, upon which the sum of three shillings four pence per share has been paid. The remaining one shilling eight pence per share has been called up and is payable by the African Gold Properties, Limited, who were the holders of the said shares prior to the same being forfeited, and the said New Balkis Eersteling, Limited, is to be deemed to be the holder of the said shares discharged from all calls due prior to the date hereof."

Subsequently, on December 12, 1900, the Randt Company made a further call of 1*s.* 3*d.* per share on the New Balkis Company, which company refused to pay it. An action for the amount of the call was brought, in which Bucknill J. gave judgment for the Randt Company for the amount claimed; and his decision was upheld by the Court of Appeal in *Randt Gold Mining Co.* v. *New Balkis Eersteling, Ld.* (1), and by the House of Lords in *New Balkis Eersteling, Ld.* v. *Randt Gold Mining Co.* (2)

In respect of the liability under art. 17 the Randt Company obtained from the African Company 790*l.* 18*s.* 1*d.*, being a trifle less than 5*d.* per share on the 40,000 shares.

The Randt Company having gone into winding-up, the liquidator took out a summons for a balance order for (amongst other sums not in dispute) 5*d.* per share on the 40,000 shares.

(1) [1903] 1 K. B. 461. (2) [1904] A. C. 165.

BUCKLEY J.

1904

RANDT GOLD MINING COMPANY, *In re.*

The summons was adjourned into Court, and heard by Buckley J. on June 21, 1904.

Clauson, for the liquidator. On the shares being forfeited the African Company ceased to be a member of the Randt Company, but was liable to pay 1*s.* 8*d.* per share on the forfeited shares. That liability was not incident to membership in the company, but was a liability under a separate contract under art. 17 which was independent of membership, and could not come into existence until membership had been determined. The sum of about 5*d.* per share which was paid by the African Company has not been called and paid in respect of the shares, but has been paid in pursuance of the separate contract. Sect. 38 of the Companies Act, 1862, provides that in the event of a company limited by shares being wound up the contribution required from any member shall not exceed "the amount, if any, unpaid on the shares in respect of which he is liable." The 5*d.* per share paid by the African Company not having been paid on the shares but under the separate contract, there is still 5*d.* a share unpaid on the shares, which the New Balkis Company, as the holder of the shares, is therefore liable to pay.

In *Randt Gold Mining Co.* v. *New Balkis Eersteling, Ld.* (1), the Court of Appeal held that the New Balkis Company notwithstanding the certificate was liable to pay the call of 1*s.* 3*d.* per share. This decision was affirmed by the House of Lords in *New Balkis Eersteling, Ld.* v. *Randt Gold Mining Co.* (2) Lord Lindley said: "What would be the result if under a certificate of this kind, or proceedings of this sort, the Randt Company were endeavouring to raise more than 5*s.* per share, I do not know; but that point has not arisen." The point is, therefore, still open.

Under similarly worded articles it was held that the person whose shares had been forfeited could not be placed on the list of contributories for calls made before the forfeiture: *Needham's Case.* (3) The forfeiture puts an end to all claims against the

(1) [1903] 1 K. B. 461. (2) [1904] A. C. 165, 170.
(3) (1867) L. R. 4 Eq. 135.

shareholders as such: *Stocken's Case.* (1) Where the right to sue for calls made before forfeiture is reserved, the liability of the ex-shareholder is as a debtor, not as a contributory: *Ladies' Dress Association* v. *Pulbrook.* (2) The fact that the company has for its own benefit so stipulated against the ex-shareholder does not lessen the liability of the existing member under s. 38. [He also referred to Buckley on Companies 8th ed. p. 538.]

P. O. Lawrence, K.C., and *C. C. Scott,* for the New Balkis Company. If the Randt Company gets 5*s.* per share from persons who are or have been holders of the shares, it cannot recover more.

The question turns on the meaning of s. 38, sub-s. 4, of the Companies Act, 1862. That says that "no contribution shall be required from any member exceeding the amount, if any, unpaid on the shares." It does not say the amount must have been received from the present member or from any one as a member. The articles were made with reference to the shares, and in respect of the shares this 5*d.* per share has already been received and cannot be recovered over again. Table A, clause 21, says that what may be recovered from the ex-shareholder after forfeiture is "all calls owing *upon such shares* at the time of the forfeiture." "On" in s. 38 and "upon" in clause 21 have the same meaning. This clause has statutory authority under s. 15 of the Act of 1862.

Where shares are forfeited for non-payment of calls, the ex-shareholder is, if winding-up takes place within a year, liable to contribute in respect of the calls: *Bridger's Case.* (3)

Where shares have been forfeited, the company may reallot them with any amount credited as being paid up on them not exceeding what has been received in respect of them: *Morrison* v. *Trustees, Executors, and Securities Insurance Corporation.* (4) The existing member is entitled to receive credit for all payments made in respect of his shares by any previous holder of them.

Clauson, in reply.

Cur. adv. vult.

(1) (1867) L. R. 5 Eq. 6; on appeal (1868) L. R. 3 Ch. 412.
(2) [1900] 2 Q. B. 376.
(3) (1869) L. R. 4 Ch. 266.
(4) (1898) 79 L. T. 605.

BUCKLEY J.
1904
RANDT GOLD MINING COMPANY, *In re.*

June 28. BUCKLEY J. (after stating the facts). The only point I have to decide is whether this 5*d.* per share can be recovered from the New Balkis Company. The applicant says truly that the African Company, after forfeiture, were not members and were not contributories, and that the 5*d.* per share which has been recovered from them has not been recovered from them as members or as contributories, but under the special contract contained in art. 17. He contends that this 5*d.* has therefore not been called and paid in respect of the shares. He argues that, having regard to s. 38, subs. 4, of the Companies Act, 1862, the member, that is to say, the New Balkis Company, can be made liable up to the amount unpaid on the shares, and that this 5*d.* per share has not been paid on the shares, but paid under the special contract contained in art. 17. In my judgment it is immaterial that the African Company paid, not as members, but under the special contract in art. 17. The material question is not what was the character of the person who paid, but what was the character of the payment made. If the company have received payment of 5*d.* in respect of the 5*s.*, the nominal amount of the share, they cannot enforce payment of it a second time. In my judgment it is plain that the 5*d.* was paid in respect of the 5*s.* payable upon the share. The special contract is that the member whose shares have been forfeited shall be liable to pay all calls "owing upon or in respect of such shares." The payment which he made was made under a liability to pay the call upon or in respect of the shares at the time of forfeiture. Its payment was, pro tanto, a discharge of the 5*s.* Suppose that a third party has guaranteed to a limited company the payment by a member of his calls upon his shares, and that under that guarantee the company recovers against the guarantor and not against the member, still the payment made by the guarantor will be a satisfaction pro tanto of the liability on the shares just as much as if the payment had been made by the member. I see no ground upon which the company should be entitled to recover the 5*d.* twice over—once from the forfeited member, and again from the member who becomes the purchaser after the forfeiture. The purchaser is liable for the

whole amount unpaid, but not for the whole amount irrespective of such payments as the company may recover from the forfeited member. As a separate and independent ground, I think that by contract between the company and the purchaser of the share the latter is entitled to the benefit of such payments as are made by the forfeited member. This point arises on the form of the certificate. The shares are sold as shares upon which the 1*s.* 8*d.* has been called up and is payable by the African Gold Properties, Limited. To such extent as the company recover in respect of that previous call they have, I think, contracted with the purchaser that he shall have the benefit of it towards satisfaction pro tanto of the amount unpaid at the time of his purchase. In my judgment the contention of the liquidator that he can recover over again from the New Balkis Company the 790*l.* 18*s.* 1*d.* which the African Gold Properties Company have paid fails. He can only recover 107*l.* 8*s.* 7*d.*, the amount agreed to be owing.

Solicitors for applicant: *Sanderson, Adkin, Lee & Eddis.*
Solicitors for respondent company: *Dale, Newman & Hood.*

F. E.

BUCKLEY J.
1904
July 21.

In re GEORGE ROUTLEDGE & SONS, LIMITED. HUMMEL *v.* GEORGE ROUTLEDGE & SONS, LIMITED.

[1900 G. 1642.]

Company—Debenture—Transfer—Purchase by Company of Debenture issued by itself—Registered Owner—Subsequent Transfer to Purchaser for Value.

Under powers contained in its memorandum and articles of association the company issued a series of 750 first mortgage debentures of 100*l.* each, to rank pari passu as a first charge on the assets of the company. All the debentures were issued. From time to time some of them came into the market, and sixteen of them were there purchased by the company itself. These debentures were in each case transferred to "George Routledge & Sons, Limited," by transfers in common form, and a note of the transfer was indorsed on the debenture. The company proceeded to enter upon the register of debenture-holders the name of the company itself as registered owner of the debenture in question. Subsequently the company transferred these debentures to various persons by transfers in common form, in which the transferor's name was given as "George Routledge & Sons, Limited," and a note of the transfer was indorsed on the debenture:—

Held, that the result of the transfer of the debentures to the company was that in each case the debt was absolutely gone, and that the security had therefore also ceased to exist; the transferees from the company had acquired nothing by the transfers to them, and were not entitled to receive new debentures ranking pari passu with those of the issue of 75,000*l.*

FURTHER CONSIDERATION and summons in a debenture-holder's action.

The company was incorporated in 1889. By its memorandum and articles of association it had power to borrow money and to create first mortgage debentures for an aggregate sum of 75,000*l.*, which should have priority over all other mortgages or securities of the company, and if necessary or desirable at any time to renew any of such first mortgage debentures.

In 1890 the company issued a series of 750 first mortgage debentures in common form of 100*l.* each. Condition 1 of the debentures was as follows: "This debenture is one of a series of like debentures, limited to the sum of 75,000*l.*, issued or to be issued by the company. The debentures of the said series

are all to rank pari passu as a first charge on the property and assets of the company, without any preference or priority one over another, and such charge is to be a floating security, but so that the company is not to be at liberty to create any mortgage or charge in priority to the said debentures." The company was to keep a register of the debenture-holders, and every transfer of a debenture was to be registered.

Condition 5: "The registered holder of this debenture shall for all purposes be regarded as exclusively entitled to the benefit thereof, and the company shall not be bound to enter on the register notice of any trust or to recognise any right in any other person."

Condition 10: "The company will on the 1st day of October, 1896, and on the 1st day of October in every subsequent year redeem at a premium of 5 per cent., equal to 105*l.* per bond, one-tenth of the said debentures, until the whole of the said sum shall have been paid off."

The debentures to be paid off were to be ascertained by drawings. The company might at any time before October 1, 1896, postpone the day fixed for the commencement of the redemption of the bonds for any number of years not exceeding five years.

All the debentures were issued. From time to time some of them came into the market, and sixteen of them were there purchased by the company itself. On each such occasion a transfer was executed to the company in common form, namely, the vendor, in consideration of a sum paid by George Routledge & Sons, Limited, thereinafter called the transferees, did thereby bargain, sell, assign, and transfer to the transferees the debenture of and in the undertaking called George Routledge & Sons, Limited. A note was also stamped on the back of the debenture that the bond had been transferred at the particular date from the vendor to the company. The company proceeded to enter upon the register of debenture-holders the name of the company itself as transferee and registered owner of the debenture in question. Subsequently, but before October, 1896, the time fixed for the commencement of the redemption, the company sold these debentures to various persons. In each

BUCKLEY J.

1904

GEORGE ROUTLEDGE & SONS, LIMITED, *In re.*

HUMMEL *v.* GEORGE ROUTLEDGE & SONS, LIMITED.

case a transfer in common form was executed to the purchaser as follows: "We, George Routledge & Sons, Limited, in consideration of the sum of £—— paid by ———, hereinafter called the said transferee, do bargain, sell, assign, and transfer to the said transferee ——— debentures numbered ——— respectively of and in the undertaking called George Routledge & Sons, Limited"; and a note was stamped on the back of the debenture as on the previous transfer, and the names of the transferees were then entered on the register of debentures as registered owners. Some of these transferees held the debentures for their own benefit, and others had taken them as securities for loans.

The Master had made his certificate, and had reserved for the consideration of the Court the question whether the transferees were entitled to be treated as holders of the debentures which they had thus acquired.

It was admitted that all the assets of the company would be absorbed by the first debenture-holders.

J. K. Young (*Astbury, K.C.*, with him), for the plaintiff. The transferees of the sixteen debentures have no right to rank equally with us, the holders of the rest of the issue. As soon as the debentures came into the company's hands they became dead and could not be revived. The debt was merged. A person who borrows money cannot be his own creditor or set up an incumbrance of his own against his creditor. He cannot be both mortgagor and mortgagee: *Watts* v. *Symes* (1); *Otter* v. *Lord Vaux*. (2) No doubt incumbrances created by other persons can be kept alive as in *Thorne* v. *Cann* (3); but that does not affect these debentures, for they were created by the company itself. In some cases a company may be in a position to create new debentures and issue them. In the present case there is nothing to shew any power to issue fresh debentures in competition with the first series, and things which have ceased to exist cannot be renewed or reissued. The holders of these debentures cannot be in a better position than the company.

(1) (1851) 1 D. M. & G. 240. (2) (1856) 6 D. M. & G. 638.
(3) [1895] A. C. 11.

The debentures do not contain any condition that purchasers shall not be affected with notice of intermediate equities. The form of the transfer shews that the respondents had ample notice; they knew they were buying from the company itself. Whatever claim the respondents may have against the company, no case of estoppel can be set up against the holders of the rest of the series: *Mowatt* v. *Castle Steel and Iron Works Co.* (1)

S. R. Earle, for the holder of two of the debentures. It is not incumbent on a person who buys a debenture in the ordinary course of business to inquire whether the internal management of the company has been strictly correct. We bought these debentures for their full value in the belief that we were getting a good security. We have always since our purchase in 1891 been treated as debenture-holders on an equal footing with the rest of the holders.

Merger is a question of intention. The Court has to consider what was the intention of the company when it took the transfer of these debentures. It had no intention to extinguish them; therefore they were not extinguished: *Thorne* v. *Cann.* (2) We are not seeking to set up a charge against subsequent incumbrancers, but against those of our own series.

[BUCKLEY J. In *Thorne* v. *Cann* (2) the person who paid off the mortgage was not liable to pay the debt. That is the whole difference: Ashburner on Mortgages, p. 475.]

It depends upon intention: *Liquidation Estates Purchase Co.* v. *Willoughby.* (3)

Even if the debentures were merged we are entitled to relief. At the time when the company sold to us it had power as a trading company to borrow money, and had power to issue debentures to the value of 75,000*l.* The company represented to us that these debentures were valid, and gave us a charge in the same form as the others. That at least amounted to a contract to give such a charge, and we are entitled to have it: *In re Queensland Land and Coal Co.* (4); *In re Strand Music Hall Co.* (5)

(1) (1886) 34 Ch. D. 58.
(2) [1895] A. C. 11.
(3) [1898] A. C. 321.
(4) [1894] 3 Ch. 181.
(5) (1865) 3 D. J. & S. 147; 35 Beav. 153.

BUCKLEY J. 1904 GEORGE ROUTLEDGE & SONS, LIMITED, *In re.* HUMMEL *v.* GEORGE ROUTLEDGE & SONS, LIMITED.

Buckmaster, K.C., and *C. Ashworth James*, for the holders of twelve of the debentures, adopted this argument, and continued:—By the first condition of the debentures each holder of a debenture of the series is entitled not to be in a worse position than that of having equal rights with the holders up to a limit of 75,000*l.* The company are not bound to keep their liability up to that figure, but they have power to do so, and the debenture-holders cannot object to it. By condition 10 none of the debentures were to be paid off before 1896, and the transfers to us were all made before that date.

The question is, What was the contract between each of the debenture-holders of the series and the company? It was not that the company might issue 750 documents and no more. The limit is in value. The amount was restricted to 75,000*l.* There was nothing to prevent the company from keeping up the amount of its indebtedness till the time fixed for redemption. A debenture which had been redeemed could not be reissued; but till that time they could keep their debentures up to the value of 75,000*l.* If a particular debenture was paid off before that time the company could issue another in its place. We have for value obtained charges on the company's property and have been put upon the register as owners of the charges. That position is not affected by the circumstances that at law the company's debt is gone and the document has become for other purposes useless. When once a debenture-holder is registered as owner he cannot be affected by prior rights.

The debentures were not extinguished when the company bought them. They were kept alive for the benefit of the company. The doctrine of keeping alive charges implies that the charge has otherwise ceased to exist. The hypothesis is that it has gone, and therefore it is revived. The question in these cases is not whether there is a liability to pay, but whether there is a liability to pay for the benefit of a third person, and whether there was an intention to keep the charge alive: *Capital and Counties Bank* v. *Rhodes*. (1) The Court will not deprive us of our charges in order to benefit the other debenture-holders to whom we owe nothing, and who knew all

(1) [1903] 1 Ch. 631.

that had happened: *Stevens* v. *Mid-Hants Ry. Co.* (1) At all events, we are entitled to hold the debentures taken to secure overdrafts as securities for the amount actually advanced.

Arthur Sims, for persons who had bought the other two debentures from the company.

BUCKLEY J. stated the facts down to the transfer to the company and the registration of its name as owner of the debenture, and proceeded:—What was the effect of that transaction? The company had become the assignee of its own debt, and become bound to pay itself 100*l.* and interest. It had also become the assignee of its own undertaking by way of charge to secure the payment. The result to my mind is that the debt and the security were both absolutely gone. A man cannot be the assignee of his own debt and cannot be mortgagee of property of which he is also mortgagor. The debt was gone, and the security was also gone. Subsequently the company transferred these debentures. The transfer was in common form, and the debenture was stamped on the back with a note of the transfer, and the names of the transferees were put on the register in respect of the debenture. To my mind that transaction had no effect. The purchasers were transferees of nothing. There was no debt in existence; there was no security in existence at the date of the transfer to them.

A second argument was raised as follows. It was said that when the person who took the transfer paid his money for it he thought that what was being transferred to him was a debenture forming part of the 75,000*l.* series. Thereupon it was argued that the company was bound to give effect to that which it is said was the real bargain between the parties by issuing to him a new debenture if this transaction did not result in giving him such a security. But was there such a bargain? To my mind there was not. There was no bargain to give anything more than a transfer of this supposed debenture. Let me put an illustration. Suppose the debentures had been debentures not assignable free from equities. The transferee of such a debenture would take subject to equities

(1) (1873) L. R. 8 Ch. 1064.

BUCKLEY J.
1904
GEORGE ROUTLEDGE & SONS, LIMITED, *In re.*
HUMMEL *v.* GEORGE ROUTLEDGE & SONS, LIMITED.

subsisting at the date of the transfer as between the company and the transferor. According to the respondents' contention, however, the transferee would be entitled to have a new debenture to which no equities attached. The transferees never bargained to have anything more than a transfer of these debentures which had become dead things. It is true that they did not pay their money in that expectation, but that was all they did get. There was no contract between them and the company except that they should have an assignment of these debentures. The second ground, therefore, on which the argument for the respondents is put fails.

I agree that if there is a contract that a person is to have a loan on the terms that the lender is to have a binding security, and he does not get that which he contracted to have, he has the right to be placed in the same position as if he had got it. But these loans were different: they were not made on the terms that there should be issued to the lenders a particular security, but that there should be transferred to them something which was not a security—something which the company had not got and could not therefore transfer to them. I think that these sixteen debentures have ceased to be securities; and I therefore declare that they do not rank pari passu with the other debentures of the same issue.

Solicitors: *R. S. Taylor, Son & Humbert; H. J. Mannings; Seaton Taylor; Nathaniel Reynolds.*

H. C. R.

MILWARD *v.* BARRY URBAN DISTRICT COUNCIL.

BUCKLEY J.

1904

July 21, 22.

[1904 M. 1694.]

Local Government—Education—Committee—Scheme—Retirement of Members—Jurisdiction of Council to alter Dates—Education Act, 1902 (2 *Edw.* 7, *c.* 42), *s.* 17, *sub-s.* 1; *s.* 21, *sub-s.* 3.

By the scheme for the constitution of the education committee of the Barry Urban District Council, approved by the Board of Education on April 16, 1903, it was provided that the committee should consist of nine members, that the members of it should hold office for a period of three years, provided nevertheless that one-third should go out of office on May 1 in the year 1904 and in each succeeding year, and that "The council shall determine the order in which they shall retire." On April 20, 1903, the council passed resolutions under which the plaintiff was to be a member of the committee and retire at the end of the second year. On April 18, 1904, the council, purporting to act under their standing orders, passed a resolution rescinding so much of the resolution of April 20, 1903, as decided that the plaintiff should retire at the end of the second year, namely, on May 1, 1905, and directing that in lieu thereof he should retire on May 1, 1904:—

Held, that the council had power to make a final scheme and determine the method of retirement; that when they had once fixed the dates of retirement they could not alter them without a new scheme; and that the resolution of April 18, 1904, was ultra vires.

MOTION that the defendants might be restrained from preventing the plaintiff from acting as a member of the Barry Urban District Education Committee.

In March, 1903, the Barry Urban District Council, who were the local education authority for the district under the Education Act, 1902, affixed its seal to a proposed scheme for the constitution of an education committee under the Act. The plaintiff, Mr. J. Milward, was a member of the council. The scheme was approved by the Board of Education on April 16, 1903. It contained, amongst others, the following provisions:—

1. "The education committee (hereinafter called 'the committee') shall when complete consist of nine members, including persons of experience in education and persons acquainted with the needs of the various kinds of schools in the Barry Urban District, appointed by the Barry Urban District Council (herein-

BUCKLEY J.
1904
MILWARD v. BARRY URBAN COUNCIL.

after called 'the council'), five being members of the council, and four other members, of whom two at least must be chosen from outside the council, one at least of these two being a woman."

6. "The five members of the committee who are elected as members of the council shall not hold office after they cease to be members of the council, and the one member of the committee who is elected as a councillor or alderman of the Glamorgan County Council shall not hold office after he ceases to be a member of the county council. Subject thereto, the members of the committee shall hold office for a period of three years, provided nevertheless that one-third shall go out of office on the 1st day of May in the year 1904, and in each succeeding year. The council shall determine the order in which they shall retire."

The proceedings of the council and its committees were regulated by standing orders. Order 40 was as follows: "It shall be competent for any member of the council for any specific purpose and object to move the suspension of all or any of the standing orders; and if at least two-thirds of the members present vote for such suspension the same shall be suspended until the specific object forming the ground of such motion shall be decided upon and disposed of by the council; otherwise no standing orders shall be suspended."

On April 20, 1903, the Barry Urban District Council passed resolutions that seven members of the council should be appointed on the education committee, and that Mr. J. Milward and six others should be the members; that the two co-opted members of the committee and the Glamorgan County Council representative should retire at the end of the first year, and that the other members of the committee should retire at the end of the second or third year according to the number of votes received. Under this resolution Mr. Milward was to retire at the end of the second year.

At the annual meeting of the council held on April 18, 1904, a motion was passed that the standing orders of the council be suspended in order to discuss the constitution of the education committee. A resolution was thereupon passed that so much

of the resolution passed by the council on April 20, 1903, as decided that Miss M. E. Meredith (one of the co-opted members) should retire from the education committee at the end of the first year and that Mr. J. Milward should retire from such committee at the end of the second year should be rescinded, and that in lieu thereof Miss M. E. Meredith should retire on May 1, 1905, and Mr. J. Milward on May 1, 1904.

Mr. Milward issued a writ in an action against the council asking for a declaration that the resolution of April 18, 1904, was ultra vires and that he was entitled to act as a member of the committee until the period of two years from the date of his appointment as a member should have expired, and an injunction restraining the defendants from preventing him from acting as a member. He moved for an interim injunction; and the motion now came on by agreement for hearing as the trial of the action.

Buckmaster, K.C., and *O. L. Clare*, for the plaintiff. The council had power under s. 17, sub-s. 1, of the Education Act, 1902 (1), to appoint an education committee, and to prepare a scheme for that purpose which had to be approved by the Board of Education. This was done, and the committee was established. By the scheme the order in which the members of the committee were to retire in rotation was to be fixed by the council. The council determined the order and had no power to alter it. By s. 21, sub-s. 3, the scheme can only be altered by a new scheme made in the same way as the first scheme.

Astbury, K.C., and *Lushington*, for the council. It is not suggested that after a person has been made a member of the

(1) Education Act, 1902, s. 17, sub-s. 1: "Any council having powers under this Act shall establish an education committee or education committees, constituted in accordance with a scheme made by the council and approved by the Board of Education: Provided that, if a council having powers under Part II. only of this Act determine that an education committee is unnecessary in their case, it shall not be obligatory on them to establish such a committee."

Sect. 21, sub-s. 3: "A scheme under this Act, when approved, shall have effect as if enacted in this Act, and any such scheme, or any provisional order made for the purposes of such a scheme, may be revoked or altered by a scheme made in like manner and having the same effect as an original scheme."

BUCKLEY J.
1904
MILWARD v. BARRY URBAN COUNCIL.

committee the council can alter the resolution which appointed him, for that is a necessary part of the scheme. The moment a person is appointed a member he has all the rights conferred by the scheme. But this scheme has to provide for the first three years of the existence of the committee. After that time the retirement will proceed automatically. For the first two years the council has to provide for the retirement of some of the members by rotation without completing their full term of service, and that rotation can be altered by the council. Clause 6 of the scheme expressly says that "the council shall determine the order in which they shall retire."

The council have proceeded regularly. Under s. 59 of the Local Government Act of 1894, which incorporates s. 199 of the Public Health Act, 1875, and makes it applicable to urban district councils, standing orders of the Barry Urban District Council have been made for the regulation of the proceedings of the council and its committees. Under these standing orders resolutions can be varied, and clause 40 provides for the suspension of the standing orders. The council have acted under those orders.

[BUCKLEY J. The council owe their power to the Education Act, 1902, and that gives them no power to alter a scheme in this way.]

Clause 6 of the scheme reserves that power.

Mr. Milward has no right to bring this action. His office is purely administrative. It is not proprietary, and he has no vested interest in any property. Therefore he has no right to complain. The council, however, desire to have the point decided, and do not press the objection to the jurisdiction.

[No reply was called for.]

BUCKLEY J. read s. 17, sub-s. 1, and s. 21, sub-s. 3, of the Education Act, 1902, and referred to the scheme. His Lordship continued:—It is to be noticed that the provisions of the Act are simply that the council shall establish an education committee. All details such as what their number is to be or how they are to retire are left, so far as the Act is concerned, to be determined under the expression "establish." That which

they establish is to be the education committee, and the scheme is not to be altered except as the Act provides. Under the term "establish" it must be that they either could or could not determine the order of retirement. If they could not determine the order of retirement, they could not resolve that one of the members should retire at a particular date. If, as I think, they could determine the order of retirement, could they reserve to themselves power from time to time to vary the order of retirement which they had once established under the Act of Parliament? I think not. What they did was this. At a meeting on April 20, 1903, they appointed certain persons, of whom Mr. Milward, the plaintiff in this action, was one. They went on to provide in the same resolutions that at the end of the first year certain persons, of whom Mr. Milward was not one, should retire; that at the end of the second year certain persons, of whom Mr. Milward was one, should retire; and that at the end of the third year certain other persons should retire. Subsequently, on April 18, 1904, they passed a resolution—that so much of the resolution passed in 1903 as decided that a certain lady, Miss Meredith, should retire at the end of the first year, and Mr. Milward at the end of the second year, be rescinded, and that in lieu thereof Miss Meredith should retire in 1905, which would be the second year, and Mr. Milward should retire on May 1, 1904, which would be the first year: that is to say, they purported to rescind a determination which they had previously made, that Mr. Milward should retire in the second year, and they required him to retire in the first year instead. I think they had no power to do so. When in 1903 they passed the resolution that he should be appointed and that he should retire at the end of the second year they were functi officio until a new scheme was approved under s. 21, sub-s. 3, of the Act of Parliament. They had appointed Mr. Milward to be a member of the education committee, to hold office until May 1, 1905. The argument on the other side really comes to this—that in introducing into the scheme the words "the council shall determine the order in which they shall retire," they had provided that the council should "from time to time" determine the order in which they should retire.

BUCKLEY J.
1904
MILWARD v. BARRY URBAN COUNCIL.

I do not think they had any power to do that. Their one power was to make a scheme. That was to be a final scheme, subject to alteration only under s. 21, sub-s. 3, and they could not make a scheme in which they could say, "This is not to be a final scheme, but is to be revocable and alterable as we from time to time think proper." The Act of Parliament prohibits that in s. 21, sub-s. 3. It says that they may revoke or alter it by a scheme made in like manner and having the same effect: otherwise they cannot do it. I do not think they had any power to reserve to themselves by the scheme any authority to vary from time to time that which they had done under the scheme. In my opinion the effect of this resolution in 1903 is just as if they had written in the scheme, "The members shall consist of nine people of whom Mr. Milward is one, and Mr. Milward shall hold office until 1905." I do not think they had any power to alter that.

A question was suggested, but Mr. Astbury said he did not wish to raise it, as to whether Mr. Milward could sue as the holder of an office in respect of which he had no property—a mere administrative office. Of course the question I am here determining would be capable of being raised somehow, and Mr. Astbury does not raise the question that the plaintiff is not the proper person to sue.

I think, therefore, the plaintiff is entitled to a declaration that the resolution that he should retire in 1904 is ultra vires; that he is entitled to act as a member of the committee until May, 1905; and that an injunction must go to restrain the council from preventing him from acting.

Solicitors: *Burton, Yeates & Hart, for J. A. Hughes, Barry; Leonard H. West, for T. B. Tordoff, Barry.*

H. C. R.

In re TRINGHAM'S TRUSTS. TRINGHAM *v.* GREENHILL.

JOYCE J.
1904
June 2, 3; July 9.

[1904 T. 77.]

Settlement—Real Estate—Limitations—Equitable Estate in Fee—No Words of Inheritance.

A limitation, in a deed, of a trust of real estate for A., without any words of inheritance, may confer the equitable fee upon him where the intention to do so is expressed or sufficiently shewn upon the face of the instrument.

By surrender and a settlement dated in 1831 copyhold hereditaments were limited in trust for M. for life, and after her death for her husband, and after the death of the survivor in trust for the children of the marriage equally as tenants in common, and in default of issue then to such uses as M. should declare by her will, with remainder to the right heirs of M. There were three children of the marriage:—

Held, that there being upon the face of the instrument sufficient indication of intention on the part of the settlor that absolute interests should be given, the three children, notwithstanding the absence of any limitation to their "heirs," were entitled as tenants in common in equal shares for equitable estates in customary fee simple.

Pugh v. *Drew*, (1869) 17 W. R. 988, followed.

In re Whiston's Settlement, [1894] 1 Ch. 661, considered and distinguished.

On May 3, 1831, certain copyhold hereditaments held of the manor of Lambeth, which Joseph Tringham, the father of Mary Ann Tringham, had agreed to purchase, were by his direction surrendered into the hands of the lord to the use of C. Chenery and W. Tringham and the survivor of them and the heirs of such survivor "in trust for Mary Ann Tringham . . . . for and during her natural life, and after her decease in trust for any husband she the said Mary Ann Tringham may marry for and during his natural life, and on the decease of the survivor of them the said Mary Ann Tringham and any husband she may marry as aforesaid then in trust for all the children of such marriage equally to be divided between them as tenants in common, and in default of issue of such marriage then to such uses as she the said Mary Ann Tringham shall declare in and by her last will and testament

JOYCE J. 1904 TRINGHAM'S TRUSTS, *In re.* TRINGHAM *v.* GREENHILL.

in writing, with remainder to the right heirs of her the said Mary Ann Tringham." At the same court W. Tringham and C. Chenery were admitted tenants of the manor in respect of the said hereditaments. By an indenture of settlement dated May 30, 1831, W. Tringham and C. Chenery declared that the surrender of the said hereditaments was made to them, and that they were admitted thereto, upon and for the trusts in the surrender expressed.

On February 23, 1832, Mary Ann Tringham intermarried with Henry Willoughby, who died on January 17, 1851.

Mary Ann Willoughby died on May 11, 1888. She had three children only, namely, H. B. Willoughby, Marianne Sarah Willoughby (now the defendant M. S. Greenhill), and Caroline Emma Willoughby.

H. B. Willoughby attained twenty-one, and died in September, 1861, a bachelor and intestate, leaving his two sisters his co-heiresses according to the custom of the manor.

On the marriage of Mrs. Greenhill in 1862 her share in the said copyholds was settled upon certain trusts in favour of herself, her husband and children.

Caroline Emma Willoughby died on December 2, 1898, having by her will devised all her estate and interest in the said copyholds to trustees upon trust for the defendant F. E. Boon and his wife and children.

A portion of the copyholds having been purchased by the London School Board, the question arose whether, having regard to the terms of the trust declared by the surrender and settlement in favour of the children of Mrs. Willoughby, they took absolute interests or estates for life only.

This was a summons taken out by the plaintiff, the present trustee of the settlement of 1831, for the determination of that question.

Brabant, for the plaintiff.

Hughes, *K.C.*, and *Howard*, for Mr. and Mrs. Greenhill. In the older text-books it is laid down that in limitations of equitable estates words of inheritance are not necessary to pass an estate in fee: Cruise's Digest, 4th ed. tit. 11, cap. 2, s. 32; Hayes

on Conveyancing, 5th ed. vol. i. p. 91; Preston on Estates, vol. ii. p. 64. But in *Holliday* v. *Overton* (1), *Lucas* v. *Brandreth* (2), and *Tatham* v. *Vernon* (3) the contrary view appears to have prevailed.

In *Pugh* v. *Drew* (4), however, where there was a trust of freeholds for A. and B. in equal shares without words of inheritance, James V.-C. held that they took equitable estates in fee.

In *In re Whiston's Settlement* (5) Chitty J. seems to have followed the more modern opinion, which does not agree with that of the older text-writers.

That decision is not binding on your Lordship in a case where, as here, an intention on the part of the settlor to confer absolute interests is sufficiently clear upon the face of the instrument. The terms of the gift over "in default of issue" indicate that if there be issue the limitation is complete.

[They also referred to Preston on Estates, vol. ii. p. 67, 1 Watkins on Copyholds, 3rd ed. p. 171, and Elphinstone on the Interpretation of Deeds, add. p. lv., add. to p. 224.]

Younger, K.C., and *Earle*, for F. E. Boon, supported the same contention, and referred in addition to *Garth* v. *Baldwin* (6), where Lord Hardwicke laid it down that a Court of Equity would not overrule the legal construction of a limitation "unless the intent of the . . . . author of the trust appears by declaration plain; that is not saying it in so many words, but plain expression or necessary implication of his intent." That is present in this case.

Austen-Cartmell, for the trustees of C. E. Willoughby's will.

H. E. Wright, for the defendant Powell, who claimed an interest in the copyholds as customary heir of a devisee under the will of Joseph Tringham, the settlor. I submit that the children of Mrs. Willoughby take life interests only, and that there is a resulting trust of the fee in favour of Joseph Tringham. If this be a question of intention, then in *Tatham* v.

(1) (1852) 15 Beav. 480.
(2) (1860) 28 Beav. 274.
(3) (1861) 29 Beav. 604.
(4) 17 W. R. 988.
(5) [1894] 1 Ch. 661.
(6) (1755) 2 Ves. Sen. 646, 655.

JOYCE J. 1904 TRINGHAM'S TRUSTS, *In re.* TRINGHAM *v.* GREENHILL.

Vernon (1) there was every indication of intention, and yet the decision was the other way. But I submit that it is not a question of intention at all: *In re Whiston's Settlement* (2); *Middleton* v. *Barker* (3); *Meyler* v. *Meyler* (4); *Dearberg* v. *Letchford.* (5)

In the case of copyholds, in the absence of special custom, there is the same necessity for words of inheritance as in the case of freeholds: *Bunting* v. *Lepingwell.* (6)

Hughes, K.C., in reply. In *Holliday* v. *Overton* (7) Lord Romilly M.R. says it is undoubtedly a question of intention: see also the report of the same case in 14 Beav. 467.

In *Lucas* v. *Brandreth* (8) and *Tatham* v. *Vernon* (1) the Master of the Rolls did not really consider the matter afresh. Even in *In re Whiston's Settlement* (2) that Chitty J. treated it as a question of intention is plain from what he said about the recital.

This deed was drawn before *Holliday* v. *Overton* (9) and that line of cases. That is material if it be a question of construction, because it is permissible to consider what was the law and practice of conveyancers at that time.

Cur. adv. vult.

July 9. JOYCE J. (after stating the facts). Having regard to the terms of the surrender and trust deed, I think that the intention to make a complete settlement of the property purchased is tolerably plain, and if there could otherwise have been any doubt upon the subject this would in my opinion be entirely removed by the form of the gift over "in default of issue," which shews that the children, if any, under the previous gift were to take absolute interests or estates in fee. Indeed, it has been so understood by all parties concerned down to the time of the purchase of a portion of the property by the London School Board, when an objection to the title was

(1) 29 Beav. 604.
(2) [1894] 1 Ch. 661.
(3) (1873) 29 L. T. 643.
(4) (1883) 11 L. R. Ir. 522.
(5) (1895) 72 L. T. 489.
(6) (1585) 4 Rep. 29 b.
(7) 15 Beav. 484.
(8) 28 Beav. 274.
(9) 15 Beav. 480.

raised upon the ground that the word "heirs" was not to be found in the limitation to the children of the beneficial trusts.

Now the question is, where there are limitations not merely of estates that are equitable by reason of the legal estate being outstanding in a mortgagee or otherwise, nor of uses that would be executed by the statute, but of an express trust estate, where the legal fee simple is in trustees, whether an equitable fee simple or customary fee can be conferred or created without the use of the word "heirs," in a case where the intention that such estate be conferred sufficiently appears on the face of the instrument.

Mr. Butler, in his note to Coke upon Littleton, 290 b, xvi., says: "A mere declaration of trust in favour of another has been held sufficient to transfer to him the equitable fee." And Mr. Preston, in vol. ii. of his Elementary Treatise on Estates, p. 64: "The general rule is, that limitations of trust are to be construed in like manner, and by the like rules, as limitations of a legal estate; and therefore, in deeds, the fee cannot pass by grant or transfer, inter vivos, without appropriate words of inheritance. But in contracts to convey, and in trusts declared in a conveyance, the fee may pass, notwithstanding the omission of a limitation to the heirs. Therefore, articles to convey to A. B. in fee; or a conveyance to A. B. and his heirs, in trust, to convey to C. D., in fee simple, would confer a right in equity, to call for a conveyance of the inheritance. So a conveyance to A. and his heirs in trust, totidem verbis, for B. in fee, would pass a fee." Mr. Hayes, in 5th ed. vol. i. of his Introduction to Conveyancing at p. 91, says: "Trusts, like uses before the statute, pursued the course of succession appointed for legal interests of a corresponding description. They were expounded, too, by analogy to the rules of legal construction. But those rules did not always govern in equity with absolute sway. The rule, for example, which required the word *heirs* to pass the fee in a conveyance at common law, although it was extended to uses within the statute, was not rigidly applied to trusts. If land was limited in trust for A., without more, equity, in conformity to the rule of law, gave to A. the beneficial interest for life only; but if it could be collected from the instrument that A. was

JOYCE J. 1904 TRINGHAM'S TRUSTS, *In re.* TRINGHAM *v.* GREENHILL.

meant to have the absolute interest, equity, esteeming the intention more than the rule, gave him the beneficial fee without the aid of the word '*heirs*.'" In Lewin on Trusts, 10th ed. p. 117, the rule is thus stated: "In creating a trust, a person need only make his meaning clear as to the interest he intends to give, without regarding the technical terms of the common law in the limitation of legal estates. An equitable fee may be created without the word 'heirs,' and an equitable entail without the words 'heirs of the body,' provided words be used which, though not technical, are yet popularly equivalent, or the intention otherwise sufficiently appears upon the face of the instrument."

In *Holliday* v. *Overton* (1) there was a settlement of real estate by a widow on a second marriage, who conveyed it to a trustee and his heirs upon trust for the settlor for her separate use for life, with remainder in the event which happened in trust for her children as tenants in common, no mention being made of their heirs. It was held that these children took life estates only; but Lord Romilly M.R., after remarking that the children were not purchasers of the fee, or of any estate of inheritance under any contract, said that though they were purchasers within the marriage contract, they were merely purchasers of such interest as the settlement gave them, which brought it back to the question, namely, what the interest was which was given them by that settlement; and that he said was "a mere question of intention." He then proceeded to examine the whole instrument, with the result that he did not find sufficient indication or any indication elsewhere than in the words of the limitation itself of an intention that the children were to take the fee, and, that limitation being simply in trust for the children as tenants in common, his Lordship held that they took life estates only. There were other points in this case, and it was taken to the Court of Appeal (2), when by arrangement the discussion upon the question what interests the children took was dropped upon terms that the appellants should not pay the costs of the appeal. There is another case, *Lucas* v. *Brandreth* (3), which was really to the same effect as

(1) 15 Beav. 480. (2) See 16 Jur. 751–2. (3) 28 Beav. 274.

Holliday v. *Overton* (1), and so also was *Tatham* v. *Vernon*. (2) In none of these cases was there anything to shew the intention beyond the simple terms of the limitation itself. The result is stated in Lewin, 10th ed. p. 118: "If an estate be conveyed by *deed* unto and to the use of a trustee and his heirs, in trust for the settlor for life, and after his death upon trust for his children simply" (that is without more), "the children by analogy to legal limitations take an estate for life only." And it must be admitted that under a conveyance to or unto and to the use of a trustee and his heirs upon trust for A. without more, no intention to confer the fee being expressed or otherwise sufficiently appearing upon the face of the instrument, A. takes an equitable life estate and no more.

But my attention was called to the case of *Pugh* v. *Drew* (3), before James V.-C. There, by deed leaseholds were settled in the events which happened in trust for A. and B. in equal proportions, share and share alike; and by another deed freeholds were settled upon such and the same trusts as in the settlement of the leaseholds expressed, declared, and contained of the premises therein mentioned and described. The intention was plain, but the word "heirs" was not there. The case was argued by Mr. C. T. Simpson, who cited *Holliday* v. *Overton* (1), *Lucas* v. *Brandreth* (4), and *Tatham* v. *Vernon*. (2) The Vice-Chancellor ridiculed the proposition that the want of words of inheritance was absolutely fatal under all circumstances, and held that A. and B. took equitable estates in fee simple in the freeholds, and not for life only. I have looked up and referred to the order itself, which shews that the fund in court representing the proceeds of the freeholds was paid out and distributed upon the footing that A. and B. were absolutely entitled.

Then there is a later case, namely, *In re Whiston's Settlement* (5), where the limitation in a settlement was "in trust for

(1) 15 Beav. 480.
(2) 29 Beav. 604.
(3) 17 W. R. 988.
(4) 28 Beav. 274.
(5) [1894] 1 Ch. 661.

JOYCE J.
1904
TRINGHAM'S TRUSTS, *In re.*
TRINGHAM *v.* GREENHILL.

such child or children of the settlor as being a son or sons shall attain the age of twenty-one years, or being a daughter or daughters shall attain the age of twenty-one years or be married under that age, which shall first happen, the same to be, if only one such child, paid, assigned, or transferred unto him or her solely, or if two or more such entitled children, then to be paid, assigned, or transferred in equal shares as tenants in common." Chitty J. examined the instrument with the result that he found no expression or sufficient indication of intention on the part of the author of the instrument that absolute interests should be given, and he considered that he had merely to deal with and construe the limitations to children as tenants in common. He read and relied upon the passage at p. 118 of Lewin on Trusts, which I have already read, and which as I think correctly states the law where there is nothing else in the case but a simple trust for a number of persons as tenants in common. Chitty J. did not, however, refer to the passage on the preceding page, and he thought that the intention to give the children more than a life estate did not appear on the face of the instrument. The decision has not been universally approved (see in particular Williams on Real Property, 19th ed. p. 181). It has been thought by some that if the Court had been astute to find in that case sufficient indication of an intention to confer absolute interests upon the children it might have succeeded in doing so. But it did not; and if Chitty J. was right as to that, it seems to me that no serious (if any) fault can be found with the decision.

The result is that where an intention to confer more than a life estate is not expressed or sufficiently shewn upon the face of the instrument, then, in a deed, a simple trust of real estate for A. without any mention of the heirs does not give more than a life estate. No case, however, has been cited where such a limitation of a trust has not been held to confer the equitable fee where the intention to do so was expressed or sufficiently shewn upon the face of the instrument. *Pugh* v. *Drew* (1) is a distinct authority that in a deed, a limita-

(1) 17 W. R. 988.

tion of a trust, the plain intention of which is to confer an equitable fee, can have that effect without the use of the word "heirs." I must follow that authority, and decide in accordance with Mr. Preston's statement of the law, and thus effectuate the intention which here, in my opinion, indisputably appears on the face of the instrument, that the children take absolute interests.

I may add that if I could not have seen my way thus to determine as a matter of construction of the deed, then, having regard to *In re Bird's Trusts* (1) and *Fitzgerald* v. *Fitzgerald* (2), I should have had most seriously to consider whether I ought not to rectify the declaration of trust in this case by the insertion of the word "heirs" where it is supposed to be required.

Solicitors: *W. J. Nichols; Rivington & Son; Rooks, Spiers & Co.; Bowman & Curtis Hayward.*

(1) (1876) 3 Ch. D. 214. (2) [1902] 1 I. R. 477.

G. A. S.

JOYCE J.
1904
June 23;
July 14, 15.

In re DAYRELL.
HASTIE *v.* DAYRELL.

[1904 D. 254.]

Will—Construction—Alteration of Words—"Of" read for "or"—Real Estate—Strict Settlement—Bequest of Heirlooms to devolve with Real Estate—Defeasance Clause—Gift over.

Testator devised his mansion-house and real estate in strict settlement, and then bequeathed certain heirlooms to trustees upon trust to permit the same from time to time to go and be held and enjoyed with the mansion-house, so far as the rules of law and equity would permit, by the person or persons who for the time being should be entitled to the possession of the said mansion-house by virtue of his will, "yet so that the said chattels shall not vest absolutely in a son or any person hereby made tenant for life of the said mansion-house unless such son or other person shall attain the age of twenty-one years":—

Held, that the word "or" must be read "of," and that the heirlooms did not vest absolutely in the first tenant in tail under the limitations, who had died an infant:

Held, further, that the heirlooms, being thus taken away by the proviso from the first tenant in tail, did not fall into the residuary bequest of personalty, but were carried over to the next person entitled to the real estate under the limitations until a tenant in tail by purchase was reached who attained twenty-one.

ADJOURNED SUMMONS.

By his will dated August 30, 1861, the Rev. Thomas Dayrell devised his mansion-house at Shudy Camps, in the county of Cambridge, with the outbuildings, yards, gardens, pleasure grounds, parks, farm buildings, and appurtenances, unto and to the use of the trustees of his will during the life or widowhood of his wife, on trust to permit her to have the use and occupation of them during her widowhood. The testator gave and bequeathed all the books, pictures, prints, statutes [*sic*], family jewellery and diamonds, works of art and ornament, plate, china, glass, furniture, and other effects in and about the mansion-house at the time of his death (except plate engraved with a certain crest) to the trustees upon trust to permit the same to be held and enjoyed by his wife during her widowhood. The will then proceeded as follows: "And from

and after her second marriage or death upon trust to permit the same from time to time to go and be held and enjoyed with the said mansion-house, so far as the rules of law and equity will permit, by the person or persons who for the time being shall be entitled to the possession of the said mansion-house by virtue of this my will, yet so that the said furniture and other effects shall not vest absolutely in or become the property of a son or any person hereby made tenant for life of the said mansion-house unless such son or other person shall attain the age of twenty-one years." The testator gave and bequeathed his residuary personal estate to the trustees upon trust for sale, conversion, and investment, and to hold the investments on trust to pay an annuity to his wife and raise a sum for his younger children, and subject thereto he bequeathed the same to his eldest son. Immediately after the death or second marriage of his wife he devised the mansion-house, and immediately after his own death all other his freehold, copyhold, or customary and leasehold lands, tenements, and hereditaments, unto and to the use of his eldest son during his life without impeachment of waste, and after his death to the use of his sons successively in tail male, and for default of such issue to the use in the same way of the testator's second and third sons and each of his daughters successively for life and their sons in tail male, with an ultimate remainder to the testator's own right heirs for ever. Then followed a provision by which the estate tail of any tenant in tail born in the testator's lifetime was cut down to a life estate, with a remainder to the use of his or her sons successively in tail male.

By codicils made in 1863 and 1864 the testator confirmed his will. The second codicil recited the bequest of the heirlooms except the clause of defeasance, but none of the above provisions were affected by the codicils.

The testator died on April 18, 1866, and his widow died on October 12, 1868.

The testator had three sons and four daughters. Of the three sons, two had attained twenty-one at the date of the will, while the third attained twenty-one in 1862. Of the testator's four daughters, one did not attain twenty-one till after his

JOYCE J. 1904 DAYRELL, *In re.* HASTIE *v.* DAYRELL.

death. All his sons survived him, but died without issue, and the present tenant for life, Mrs. Young, was a daughter who married in 1869, and had had one son who died in infancy. Other daughters of the testator were living, and the present presumptive tenant in tail in remainder was the son of one of them who had attained twenty-one.

This summons was taken out by the present trustees of the will for the determination, amongst others, of the question whether the deceased infant tenant in tail or his legal personal representatives when constituted had become entitled, subject to his mother's life interest, absolutely to the heirlooms. The father of the infant was appointed to represent his interest for the purposes of the argument.

Peterson, for the trustees.

Manning, for the presumptive tenant in tail in remainder. The words of the proviso as they stand are unintelligible. "Or" should be read "of."

Moreover, the effect of the codicils is to republish the will: *In re Champion* (1); *In re Trotter* (2); and at the date from which the will takes effect all the sons had attained twenty-one.

The Court will alter the phraseology of the will in order to give effect to the intention of the testator: *Hart* v. *Tulk*. (3) "Or" is manifestly a mistake in copying and can be rectified: *In re Redfern*. (4)

There are other mistakes in copying in the will, e.g., "statutes" for "statues."

A. F. C. Luxmoore, for the father of the deceased infant tenant in tail. At the date of the will one of the sons was under twenty-one. The words of the proviso were used to fit the circumstances at the time. The codicils cannot affect the proviso. Again, it is not a question of altering the one word "or," because in order to render the clause intelligible the words "such son or other person" must be struck out altogether. If the words are to be altered, it must be perfectly clear what the alteration should be: *Taylor* v. *Richardson*. (5)

(1) [1893] 1 Ch. 101, 109.
(2) [1899] 1 Ch. 764.
(3) (1852) 2 D. M. & G. 300.
(4) (1877) 6 Ch. D. 133.
(5) (1853) 2 Drew. 16.

JOYCE J. 1904 DAYRELL, *In re.* HASTIE *v.* DAYRELL.

JOYCE J. This is a lawyer's will as a whole technically framed, and containing many elaborate and special clauses which could only have been drafted by an experienced conveyancer, and except in the case of the particular clause upon which the question I have to determine arises the will appears to have been skilfully and carefully prepared.

In *Bernasconi* v. *Atkinson* (1) Wood V.-C. lays it down that we are always bound to assume the language of the will to be the language of the testator. If so it cannot, I think, be wrong to credit the testator with that knowledge of the law which the draftsman of the will evidently possessed.

Now, taking the words of the clause of defeasance we have to consider as they stand, the question at once arises what or whose sons are referred to. If the testator's sons, one would rather have expected to find them described as "son of mine," or described in some other manner with reference to their parent. If the sons mentioned were sons of the testator I do not see why the daughters, also made tenants for life, should not have been mentioned as well. Upon the whole it appears to me that at an early stage in the preparation of this will the word "of" after the word "son" was miscopied "or"; and it is to be noted that in the same gift of chattels we find the word "statutes"—obviously a miscopying for the word "statues." This shews that there was some carelessness in the copying of this part of the will. The words "or other person" when repeated in the latter part of the clause create some difficulty. But these may well have been inserted by some blundering attorney's clerk adding the words "or other person" to make the clause read as he thought right. It is quite impossible to suppose that the testator or the real author of the document could have imagined that the chattels would vest absolutely in any of the testator's children or in any person made tenant for life, and the clause so read, that is, as to confine the sons mentioned to sons who were or were made tenants for life, would be useless and absurd nonsense. Examples of the usual forms of this clause will be found in the note to p. 93 of L. R. 5 H. L. I cannot entertain any doubt that this

(1) (1853) 10 Hare, 345, 348.

JOYCE J. 1904 DAYRELL, *In re.* HASTIE *v.* DAYRELL.

clause of defeasance was not originally penned as it now stands in the will. The general intention, however, is perfectly plain. The object and only object of such clause must have been to prevent tenants in tail from becoming entitled to the chattels. The sons referred to must have been those in whom but for this proviso the chattels would have vested absolutely—that is to say, I hold that the sons of the testator's children were at all events intended to be referred to, and I hold that the clause operates to prevent the son who died under twenty-one of one of the tenants for life becoming absolutely entitled to the chattels. In other words, I reject the claim made on behalf of the son of Mrs. Young that died under twenty-one.

July 14, 15. The case was subsequently further argued upon the question whether having regard to the proviso of defeasance the chattels had passed subject to the previous existing life estate to the next tenant in tail in remainder, or were not expressly disposed of and so fell into the residuary bequest of personalty.

Manning, for the presumptive tenant in tail in remainder. The effect of the limitations in this case is to carry over the chattels to the persons entitled in succession to the mansion-house until some tenant in tail is reached who becomes absolutely entitled. The limitations are not altogether like those in *Harrington* v. *Harrington* (1), where Lord Cairns L.C. held that the chattels passed under the residuary clause in the will. They are, however, substantially the same as those in *Christie* v. *Gosling* (2), where it was held that the clause of defeasance carried on the heirlooms to the persons entitled in remainder.

Lord Cairns himself in *Harrington* v. *Harrington* (3) apparently agreed with Lord Westbury's reasons for his decision in *Gosling* v. *Gosling* (4), which was affirmed by the House of Lords in *Christie* v. *Gosling*. (2)

The distinction between the two cases is clearly pointed out by Lord Cairns in *Harrington* v. *Harrington* (3), namely, that

(1) (1868) L. R. 3 Ch. 564; (1871) L. R. 5 H. L. 87.
(2) (1866) L. R. 1 H. L. 279.
(3) L. R. 3 Ch. 572.
(4) (1862) 1 D. J. & S. 1.

in *Christie* v. *Gosling* (1) it was possible to say, immediately after the death of the testator, who were the personæ designatæ to whom the chattels were in the first instance bequeathed; whereas in *Harrington* v. *Harrington* (2) the class of persons to take had to be ascertained by future events. [He also referred to *Martelli* v. *Holloway*. (3)]

P. B. Lambert, for the legal personal representative of the residuary legatee. I submit that these chattels fall into residue. In the absence of the proviso, as it has now been interpreted, the chattels would have vested in the first tenant in tail. The proviso does not create a new interest in any one. It is merely negative and not dispositive in its effect. Its only effect is to take away the chattels from the tenant in tail who did not attain twenty-one; it does not further dispose of them.

In *Foley* v. *Burnell* (4) the words were substantially the same as in this case.

Christie v. *Gosling* (1) and *Martelli* v. *Holloway* (3) belong to a different class of cases. *Christie* v. *Gosling* (1) was the case of a gift of chattels on trusts corresponding with the uses of real estate. In *Martelli* v. *Holloway* (3) there was a disposition of freeholds and chattels in one gift. Where there is a good executory trust no doubt the chattels are carried on. Here there is no executory trust.

Immediately on the birth of a tenant in tail the transmissibility of the chattels ceases, and the proviso does not carry them on.

"Possession" means actual physical possession, and not merely a vested interest: *In re Angerstein.* (5)

The addition to the proviso of the words "so far as the rules of law and equity permit" do not make the trust an executory one: *Lord Scarsdale* v. *Curzon* (6); *In re Hill.* (7) The meaning of the gift of the heirlooms is that they are to devolve with the mansion-house until some rule of law intervenes. The

(1) L. R. 1 H. L. 279.
(2) L. R. 3 Ch. 564; L. R. 5 H. L. 87.
(3) (1872) L. R. 5 H. L. 532.
(4) (1783) 1 Bro. C. C. 274.
(5) [1895] 2 Ch. 883, 887.
(6) (1860) 1 J. & H. 40.
(7) [1902] 1 Ch. 537, 807.

JOYCE J. 1904 DAYRELL, *In re.* HASTIE *v.* DAYRELL.

rule of law giving them absolutely to a tenant in tail has intervened.

In *Harrington* v. *Harrington* (1) Lord Cairns approved of the opinion which he had expressed in that case when it was before the Court of Appeal.

No reply was called for.

JOYCE J. It is admitted that the first tenant in tail in remainder, but for the construction which I have placed upon the proviso for defeasance, would have become entitled to these heirlooms. That proviso, in my opinion, takes them away from him. The question which I now have to determine is, whether, subject to the estate of the present tenant for life, they pass under the residuary bequest, or whether they are carried on through the successive limitations until some tenant in tail by purchase is arrived at who attains twenty-one.

I think that this case, when examined, is materially different from *Harrington* v. *Harrington* (2), and that, for the purposes of the question which I have now to decide, the limitations are practically equivalent to those in *Christie* v. *Gosling*. (3) In that case Lord Westbury thought that the effect of the proviso was to substitute the next tenant for life or tenant in tail by purchase for the preceding tenant in tail. In *Harrington* v. *Harrington* (2) Lord Cairns, in giving judgment in the Court of Appeal, speaking of *Christie* v. *Gosling* (3), said (4): "In the House of Lords the decision of the Lord Chancellor was confirmed. It is true that the opinions expressed by Lord Chelmsford and Lord Cranworth, who formed the majority, do not in terms do more than affirm the validity of the bequest up to and including the estate of the son of Ellis, the first tenant in tail. But I cannot think that those noble and learned Lords did not also concur in the opinion of Lord Westbury as to the efficacy of the gift over on the death under twenty-one of the son of Ellis." Consequently I think that I must

(1) L. R. 5 H. L. 87.
(2) L. R. 3 Ch. 564.
(3) 1 D. J. & S. 1; L. R. 1 H. L. 279.
(4) L. R. 3 Ch. 572.

hold the effect of the limitations in the present will to be that these chattels are carried on to the next persons entitled to the real estate under the limitations until a tenant in tail by purchase is reached who attains twenty-one.

Solicitors: *Hasties; Leesmith, Munby & Nevile, for Munby & Scott, York.*

G. A. S.

PEASE *v.* COURTNEY.

[1903 P. 2807.]

Settled Land — Agreement for Lease — Principal Mansion House — Park — "Usually occupied therewith" — Easement over Mansion House — Invalidity of Agreement — Liability of Lessor — Settled Land Act, 1890 (53 & 54 *Vict. c.* 69), *s.* 10.

Sect. 10 of the Settled Land Act, 1890, which precludes the life tenant (inter alia) from leasing "the principal mansion house (if any) on any settled land, and the pleasure grounds and park and lands (if any) usually occupied therewith," without the consent of the trustees or an order of the Court, applies to a park not usually occupied with the principal mansion house, the words "usually occupied therewith" referring merely to the words "lands (if any)" immediately preceding them.

The section also applies to the lease of an easement over the same property.

Dowager Duchess of Sutherland v. *Duke of Sutherland*, [1893] 3 Ch. 169, followed.

The word "park" as used in the Settled Land Acts is not confined to an ancient legal park, but includes an ordinary private park.

A life tenant without the consent of the trustees agreed to let the park, together with an easement over the mansion house, for a term of years. The lessees entered and held under the agreement, which contained no provision as to title. The lessor died without being required to execute a lease, and the lessees were ejected by the remainderman. It did not appear that the lessor could have obtained the trustees' consent:—

Held, that the lessees were not entitled to damages against the lessor's estate.

Day v. *Singleton*, [1899] 2 Ch. 320, distinguished.

WITNESS ACTION.

This was an action by the present life tenant and remainderman of the South Leigh estate, Hants, to set aside an

SWINFEN EADY J.

1904

PEASE v. COURTNEY.

agreement by the late life tenant (hereinafter called the lessor) to grant a lease of South Leigh Farm to the defendants.

On March 24, 1890, J. B. Barkworth, the settlor, purchased the main portion of the South Leigh estate, which comprised a mansion house with pleasure grounds and a park of about 55 acres, beautifully timbered and fringed with plantations and shrubberies, through which pleasant walks had been made, a smaller residence, a farm, and other land amounting in the whole to 312 acres. The mansion house, pleasure grounds, and the upper part of the park nearest the mansion house were then in hand, the lower part being let with certain other land to Gill on a yearly tenancy.

On January 23, 1891, the settlor purchased another 43 acres.

By his will dated May 9, 1893, the settlor devised the South Leigh estate to his wife, the lessor, for life, with remainder to the present life tenant for life, with remainder to his eldest son in tail, and appointed trustees of the settlement for the purposes of the Settled Land Acts.

The settlor died on October 19, 1893. At the time of his death the mansion house was supplied with water from a reservoir on the top of a tower in the curtilage. The reservoir was filled by a steam-pump, which was only worked when the house was occupied. South Leigh Farm had an independent water supply from wells and a pond.

After the settlor's death the lessor led pipes through the park to South Leigh Farm, so as to supply the farm from the reservoir.

By an agreement under hand dated September 30, 1902, and made between the lessor (which word included her heirs, successors, and assigns) of the one part and the defendants of the other part, the lessor agreed to let South Leigh Farm, containing 309 acres, which included the whole of the park (except a plantation), to the defendants for fourteen years from September 29, 1902, determinable by either party at the end of the seventh year on one year's notice, at a rent of 350*l*. The agreement provided (inter alia) that the water supply from the tower to the farm and buildings should be continued free of any cost to the tenants, except so far as keeping all taps,

joints, and pipes in repair above ground. This agreement was made without the consent of the trustees of the settlement or an order of the Court.

The defendants, who made no inquiry into the lessor's title, took possession under the agreement and paid a heavy valuation to the outgoing tenant.

The lessor died on October 25, 1902, and the present life tenant thereupon claimed that the agreement was void.

On July 14, 1903, the present life tenant served the defendants with notice to quit on September 29, 1903.

The defendants held over, and on December 10, 1903, the plaintiffs commenced this action to set aside the agreement and for recovery of possession and mesne profits from September 29, 1903.

The defendants, who relied on their agreement, did not admit that any portion of the park was usually occupied with the mansion house.

By their counter-claim, to which they made the lessor's executrix a defendant, they claimed specific performance against the present life tenant, and in the alternative damages against the executrix on the ground that the lessor had impliedly agreed to grant a valid lease, and had not done so.

The evidence as to the occupation of the park was conflicting. The result is stated in the judgment.

Micklem, *K.C.*, and *E. Ff. Ball*, for the plaintiffs. The agreement included the park, and is therefore void under s. 10 of the Settled Land Act, 1890, which provides—Sub-s. 1: "From and after the passing of this Act section fifteen of the Act of 1882, relating to the sale or leasing of the principal mansion house, shall be and the same is hereby repealed." Sub-s. 2: "Notwithstanding anything contained in the Act of 1882, the principal mansion house (if any) on any settled land, and the pleasure grounds and park and lands (if any) usually occupied therewith, shall not be sold, exchanged, or leased by the tenant for life without the consent of the trustees of the settlement or an order of the Court." Sub-s. 3: "Where a house is usually occupied as a farmhouse, or where the site of

SWINFEN EADY J.
1904
PEASE v. COURTNEY.

any house and the pleasure grounds and park and lands (if any) usually occupied therewith do not together exceed twenty-five acres in extent, the house is not to be deemed a principal mansion house within the meaning of this section."

The repealed s. 15 of the Act of 1882 provided as follows: "Notwithstanding anything in this Act, the principal mansion house on any settled land, and the demesnes thereof, and other lands usually occupied therewith, shall not be sold or leased by the tenant for life, without the consent of the trustees of the settlement, or an order of the Court."

Now the mansion house is clearly a principal mansion house, and the park of 55 acres is a park in the ordinary acceptation of the word. Having regard to the repetition of the word "and" in the phrase "the mansion house . . . . and the pleasure grounds and park and lands (if any) usually occupied therewith," it is clear that the words "usually occupied therewith" only apply to "lands (if any)," and not to "the pleasure grounds and park." The latter phrase is simply an expansion of the phrase "the demesnes thereof" in the repealed section, where the words "usually occupied therewith" only apply to the "other lands." If, however, it is necessary to shew that the park was usually occupied with the mansion house, the evidence is clear that the settlor so occupied it.

The agreement also included a right to the supply of water through the park from the tower adjoining the mansion house. This is equivalent to the grant of an easement over the mansion house and curtilage, and is clearly void: *Dowager Duchess of Sutherland* v. *Duke of Sutherland*. (1)

Cave, *K.C.*, and *Rolt*, for the defendants. The evidence shews that the park, except possibly the upper part, was not usually occupied with the mansion house in the settlor's lifetime.

Now s. 10 of the Act of 1890 only applies to a park so occupied. This is clear on the grammatical construction of the section.

Again, the words "the demesnes thereof" in the repealed section obviously connote occupation with the mansion house,

(1) [1893] 3 Ch. 169, 194.

and can only be correctly expanded into "the pleasure grounds and park . . . . usually occupied therewith."

If the section applies to a park unconnected with the mansion house, the word "park," being undefined by the Settled Land Acts, must have its strict legal meaning, which involves vert, venison, and inclosure, and creation by Crown grant or prescription.

[SWINFEN EADY J. Sect. 10, sub-s. 3, shews that an inclosure of less than 25 acres may be a park within the Settled Land Acts. This rather negatives the strict legal meaning.]

Again, the improvements authorized by s. 25 of the Settled Land Act, 1882, include reservoirs, tanks, conduits, watercourses, pipes, and other works and machinery for supply and distribution of water for agricultural purposes. The supply of water to the farm is obviously covered by these words. Sect. 10 of the Act of 1890 cannot have been intended to prevent a water supply being obtained from or carried through lands occupied with the mansion house. Even if such a water supply is an easement, which is doubtful, it is authorized as an improvement.

In *Dowager Duchess of Sutherland* v. *Duke of Sutherland* (1) there was mala fides, and the rights of way granted were highly detrimental to the estate. In the present case the farm water supply is beneficial to the estate, although it involves pumping.

The agreement is therefore valid, and the defendants are entitled to specific performance against the present life tenant.

In the alternative they are entitled to damages against the lessor's executrix.

An agreement to let land is an agreement to grant a valid lease, and implies that the lessor has a good title: *Stranks* v. *St. John.* (2)

The lessor neglected to get the consent of the trustees, and the defendants are therefore entitled to substantial damages for the loss of the lease: *Day* v. *Singleton.* (3) Even if the lessor was not guilty of negligence, the defendants are entitled to recover the expenses incurred, such as the costs of the agreement: *Bain* v. *Fothergill.* (4)

(1) [1893] 3 Ch. 169, 194.
(2) (1867) L. R. 2 C. P. 376.
(3) [1899] 2 Ch. 320, 327.
(4) (1874) L. R. 7 H. L. 158.

SWINFEN EADY J.

1904

PEASE v. COURTNEY.

Eve, K.C., and *Clauson*, for the lessor's executrix. In *Day* v. *Singleton* (1) the vendor of a lease induced his lessors to refuse their consent to the assignment. In the present case there is nothing to shew that the lessor could have procured the consent of the trustees; so that substantial damages are out of the question. As a matter of fact, the defendants have not suffered any damage. They took possession under the agreement, and thereby accepted the title. They have had possession for about two years. They did not ask the lessor for a lease, and if a lease had been granted it would have contained a qualified covenant for quiet enjoyment, which would not have extended to the acts of the plaintiffs. There has therefore been no breach of the agreement.

Micklem, K.C., in reply.

SWINFEN EADY J. (after stating the facts). The plaintiffs contend that the agreement is void on the ground that the lessor could not contract to grant a lease of the park without the consent of the trustees of the settlement or an order of the Court. The defendants allege that the park was not usually occupied with the principal mansion house, and that s. 10 of the Settled Land Act, 1890, is therefore inapplicable, and they contend that the section only applies to a park, if usually occupied with the principal mansion house. The plaintiffs, on the other hand, urge that the phrase "usually occupied therewith" only applies to the "lands (if any)," and not to the pleasure grounds and park. In my opinion the plaintiffs' construction is correct.

The section speaks of "the principal mansion house (if any) on any settled land, and the pleasure grounds and park and lands (if any) usually occupied therewith." It does not say "the pleasure grounds, park, and lands," but separates the pleasure grounds and park by the copulative "and."

In my opinion, therefore, having regard to the grammatical context, the words "usually occupied therewith" merely apply to the words "lands (if any)" immediately preceding them. This view is borne out by the repealed s. 15 of the Act of

(1) [1899] 2 Ch. 320, 327.

1882, which contained a similar provision as to "the principal mansion house on any settled land, and the demesnes thereof, and other lands usually occupied therewith." In s. 10 of the Act of 1890 the words "the demesnes thereof" are expanded into "the pleasure grounds and park." Under those circumstances, and apart from any question whether the park was in fact usually occupied with the principal mansion house, I am of opinion that the lessor had no right to let it without the consent of the trustees of the settlement or an order of the Court.

The defendants also contend that the park in question, not being an ancient legal park, is not a park within the meaning of the Settled Land Acts. They are correct in saying that there were at least three requisites to such a park, namely, vert, venison, and inclosure. They also say that a Crown grant or prescription was necessary. Without considering the latter point, as to which there is a difference of opinion, whether any Crown licence was required before a subject could make a park in the reigns of the Plantagenet Kings provided that their rights of forest were not infringed, it is clear that vert, venison, and inclosure were necessary. In *Sir Charles Howard's Case* (1), where the King, being seised in fee of a park, by letters patent under the great seal published his pleasure for disparking it and granted away the deer, the justices and barons all agreed, "That the park is well dissolved, and shall no more be accounted a park, all the deer being destroyed, for a park consisteth of *vert* and *venison* and *enclosure*; and if it be determined in any of them, it is a total disparking."

In my opinion, however, it is abundantly clear that the Settled Land Acts do not use the word park in its legal or technical sense, but according to its ordinary and natural meaning in common parlance.

In addition to the legal meaning, the Imperial Dictionary gives (inter alia) the following meanings: "(2.) A considerable extent of pasture and woodland, surrounding or adjoining a mansion-house, devoted to purposes of recreation or enjoyment, but chiefly to the support of a herd of deer, though sometimes

(1) (1626) Cro. Car. 59, 60.

SWINFEN EADY J.
1904
PEASE v. COURTNEY.

to cattle and sheep. (3.) Any piece of public ground, generally in or near a large town, laid out and cultivated for the sole purpose of pleasure and recreation, without any regard to the size of the ground or the style of the arrangement."

The Settled Land Acts evidently use the word in the former sense, namely, an ordinary private park.

The park in the present case, which consists of 55 acres of ancient pasture with drives through it and with a considerable quantity of ornamental timber and forest trees standing out in the open and not in hedgerows, is clearly a park within the meaning of the Settled Land Acts; and as the site of the mansion house and the pleasure grounds and park and lands occupied therewith exceed 25 acres, there is nothing in s. 10, sub-s. 3, of the Act of 1890 to prevent the mansion house being a principal mansion house.

If it were necessary to determine whether the upper and lower parts of the park were both usually occupied with the principal mansion house, I should hold on the evidence that they were so occupied. [His Lordship then reviewed the evidence on this point, and held that the settlor had determined Gill's tenancy of the lower part of the park on March 24, 1892, the earliest date possible, and though he subsequently allowed cattle to be grazed over the whole park under agistment contracts, he did not again let any portion of it, but retained the whole in his exclusive occupation.]

The plaintiffs also contend that the agreement is invalid because it provides that the water supply from the tower to the farm and buildings shall be continued free of any cost to the tenants except so far as keeping all taps, joints, and pipes in repair above ground. This provision, which involves working the steam-pump whether or not any water is required for the mansion house, creates an obligation which the lessor had no power to impose on her successors.

In *Dowager Duchess of Sutherland* v. *Duke of Sutherland* (1) it was argued that s. 10 did not apply to a lease of an easement over the principal mansion house, park, and lands; but Romer J. said: "In my judgment, though s. 10 does not repeat the words

(1) [1893] 3 Ch. 169, 194.

in s. 6 (the leasing section) of the Act of 1882, 'or any part thereof, or any easement, right, or privilege of any kind, over or in relation to the same,' it has the same operation and effect as if those words had been repeated. Sect. 10, which relates generally to sales, exchanges, and leases by the tenant for life, is intended to refer, and does in effect refer, compendiously to the powers of sale, exchange, and lease which are referred to in more detail in the Act of 1882, and in particular to all the kinds of leases mentioned in s. 6 of that Act. It would, indeed, be absurd if a tenant for life could not, without the consent of the trustees of the settlement or an order of the Court, sell or lease the mansion house, but could, nevertheless, without such consent or order, sell or lease a part of it or an easement over it." On that additional ground the agreement is invalid. The plaintiffs are entitled to a declaration to that effect, and to judgment for possession and mesne profits.

The defendants' counter-claim against the plaintiffs for specific performance fails as a matter of course. In the alternative, they claim damages against the lessor's executrix on the ground that the agreement was an agreement to grant a valid lease, which had not been and could not be granted. But the agreement did not contain any provision that the lessor should shew a good title, or allow it to be investigated. The defendants, however, contend, in reliance on *Day* v. *Singleton* (1), that the lessor ought to have applied to the trustees for their sanction to the agreement, and that her failure to do so renders her estate liable in damages. But in *Day* v. *Singleton* (1) the vendor of a lease induced his lessors to refuse their consent to the assignment, so that the purchaser lost his bargain through the vendor's wilful default. Lindley M.R. said: "If Singleton could not obtain the consent, then, as already stated, specific performance would be impossible, and Day's action as it stood must have failed; and in such case Day could only have recovered back his deposit and interest and the cost of investigating the title. This is shewn by *Bain* v. *Fothergill*. (2) But if Singleton could have got the lessors' consent and would not—still more, if the refusal of that consent

(1) [1899] 2 Ch. 320, 327. (2) L. R. 7 H. L. 158.

SWINFEN EADY J.

1904

PEASE v. COURTNEY.

was procured by Singleton—Day would have had a right of action for damages against Singleton for a breach of his duty to obtain the lessors' consent, it being in his power to obtain it." If, therefore, the trustees' consent could not have been obtained, the matter would have come within *Bain* v. *Fothergill* (1), and the lessees could at most have recovered their costs of investigating the title.

In the present case, however, it is not shewn that the defendants ever asked for the lease, or required the lessor to execute it. The lessor died on the 25th day after the agreement was signed, without any such application being made; and it does not appear that the lessor could have obtained the trustees' consent. If it is a case in which the trustees would have given their consent on the lessor's request, why should they not give it to a lease by the present life tenant? But the real answer to the claim is that there was no breach of the agreement on the part of the lessor. The defendants did not investigate or stipulate for a right to investigate her title. Moreover, if the lease had been granted, it would only have contained a qualified covenant by the lessor for quiet enjoyment, restricted to the acts of the lessor and those claiming through her, and an ejectment by the present life tenant would be no breach of this covenant.

In my opinion the lessor's executrix is under no liability in respect of the agreement.

The counter-claim fails, and must be dismissed with costs.

Solicitors: *Hughes, Hooker & Co.; Powell & Rogers, for E. R. Longcroft, Havant; Collyer-Bristow, Hill, Curtis, Dods & Booth.*

(1) L. R. 7 H. L. 158.

G. R. A.

HERTFORDSHIRE COUNTY COUNCIL *v.* THE GOVERNORS AND COMPANY OF THE NEW RIVER.

SWINFEN EADY J.
1904
July 15, 16.

[1904 H. 981.]

Bridges—Approaches—Highway—Liability to repair 300 *feet from end of Bridge—Statute of Bridges* (22 *Hen.* 8, *c.* 5)—*New River Company's Acts* (3 *Jac.* 1, *c.* 18; 4 *Jac.* 1, *c.* 12)—*New River Company's Charter.*

The rule laid down by the Statute of Bridges, that the persons liable to repair a bridge are also liable to repair the highway adjoining to each end of the bridge for a distance of 300 feet, applies where the bridge is repairable by the county, and where the liability arises by prescription or (*semble*) ratione tenuræ; but it does not apply in cases where the liability is directly imposed by a later statute.

The Acts authorizing the making of the New River directed that bridges should be made where convenient, and the New River Company's charter bound it to maintain the New River and its bridges:—

Held, that the company were bound to maintain the bridges and the approaches thereto, i.e., so much of the road at each end as had been raised or interfered with by making the bridge, and what the approaches were must be ascertained as a fact in each case. They were not bound to repair 300 feet of the highway in every case.

This was an action brought by the county council of Hertfordshire against "the Governors and Company of the New River brought from Chadwell and Amwell to London" for a declaration that the defendants were bound to repair and keep in repair three bridges carrying highways over the New River at Broxbourne, Stanstead St. Margaret's, and Wormley respectively, and the arches and other parts thereof and approaches thereto, including the highways over such bridges, and such parts of the highways adjoining as lay within 300 feet next adjoining the ends of such bridges.

By an Act of 3 Jac. 1, c. 18, the lord mayor, commonalty, and citizens of London were empowered to make a trench ten feet wide for the New River, and it was enacted (s. 6) that the mayor, commonalty, and citizens of London and their successors should make and maintain at their costs and charges from time to time convenient bridges and ways for the passage of the King's subjects and their cattle and carriages over

SWINFEN EADY J.

1904

HERTFORDSHIRE COUNTY COUNCIL v. NEW RIVER COMPANY.

or through the said new cut or river in places meet and convenient.

By an Act of 4 Jac. 1, c. 12, the former Act was explained and power given to the corporation to make a brick or stone vault for the river to flow in instead of an open trench.

The corporation afterwards assigned their rights and powers to Sir Hugh Middleton, and finally in 17 Jac. 1 a charter was granted incorporating Sir Hugh Middleton and others under the name of the Governors and Company of the New River, and the charter provided: "That the said Governors and Company of the New River . . . . and their successors at all and every tyme and tymes hereafter shall well and sufficiently maintaine repair preserve and scour the said new river and stream and all the bancks and bridges of and belonging to the same as now it is."

The bridges in question had been erected by the New River Company under their statutory powers and had been maintained and kept in repair by them, but they had repaired in practice only the bridges and no part of the approaches. All the adjoining highways had been repaired by the local authority. In the case of the three bridges specified the adjoining highways were main roads within the Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), and had been repaired by the plaintiffs.

The defendants admitted that they were liable to repair the approaches to the bridges, including in the approaches so much of the highway on each side of each bridge as had been raised or otherwise interfered with by reason of the construction of the bridge, but not to the extent of 300 feet from each end of the bridge.

The plaintiffs contended that the limit of 300 feet was fixed by the Statute of Bridges, which, after providing for enforcing the repair of bridges by the persons liable, gives power to the justices to enforce the repair of the highways at the ends thereof. (1)

(1) 22 Hen. 8, c. 5, s. 7: "Forasmouch that albe it bridges decayed were amended and repayred accordyng to the tenour of this Acte, yet nevertheless if spedy remedy for amendment of the wayes next adjoynyng

Danckwerts, K.C., *Micklem, K.C.*, and *Barnard Lailey*, for the plaintiffs. For the purpose of repairs the highway at each end of the bridge and forming the approaches thereto has always been treated as part of the bridge, and the persons who were bound to repair the bridge were at common law bound to repair the approaches. To avoid dispute as to what the approaches were, the Statute of Bridges fixed a hard and fast line of 300 feet, and also provided that the county must repair all bridges where no one else is proved to be liable. This principle of liability for repair of the approaches was first established in the *Abbot of Combe's Case* (1), and was recognised and enforced against a county in *Rex* v. *Inhabitants of the West Riding of York* (2), which was affirmed by the House of Lords. (3) In that case Lord Eldon says the statute has fixed the length at 300 feet. The same rule has been applied where the liability to repair the bridge arises by prescription: *Reg.* v. *Lincoln Corporation*. (4) The principle is stated by Lord Coke, 2nd Inst. p. 700.

---

to every of the endes of suche bridges showld not be hadd and made, the Kyng's subjectes shuld take lytle or none avayle or cõmodyte in many parties of this realme by the makyng of the bridgis; in consideracion wherof be it enacted by the Kyng our sovereign lorde and the lordes spirituall and temporall and the comons in this present parliament assembled, and by auctorite of the same, that suche parte and porcion of the high wayes in every part of this realme as well within franchise as without as lye next adjoynyng to any endes of any bridges within this realme distaunt from any of the said endes by the space of CCC fote, be made repayred and amended as often as nede shall requyre: And that the justices of the peace in every shire of this realme franchise citie or borough or iiij of them at the leste, whereof one to be of the quorum, within the lymyttes of their cõmyssions and auctorities shall have power and auctorite to enquire hear and determyne in the King's generall cessions of peace, all manner of anoysaunces of and in suche hye wayes so beyng and lyeng next adjoynyng to any endes of brydges within this realme, distante from any one of the endes of such brydges CCC fote, and to do in every thyng and thynges concernyng the makyng repayryng and amendyng of such high wayes and every of them, in as large and ample manner as they mought and may do, to and for the makynge repayrynge and amendyng of bridges by virtue and auctorite of this presente Acte."

(1) 43 Ass. 275, pl. 37; Bro. Abr. tit. "Presentments in Court," 22, 29.

(2) (1806) 7 East, 588; 8 R. R. 688.

(3) (1813) 5 Taunt. 283, 294; 2 Dow, 1; 14 R. R. 751.

(4) (1838) 8 Ad. & E. 65; 47 R. R. 484.

SWINFEN EADY J.

1904

HERTFORDSHIRE COUNTY COUNCIL v. NEW RIVER COMPANY.

The liability of the defendants to repair the bridges, which they do not deny, arises from the common law doctrine that if a man for his own convenience makes a cut across a highway he is bound to restore a means of passage for all the King's subjects as convenient as before. That principle is established by a case in 8 Edw. 2 (1), and has been followed in numerous cases: *Rex* v. *Inhabitants of Kent* (2); *Rex* v. *Inhabitants of Lindsey* (3); *Rex* v. *Kerrison.* (4)

In *Rex* v. *Inhabitants of Kent* (2) Lord Ellenborough held that the public had adopted for their own convenience a bridge originally made by a navigation company, and the county were liable to repair it. He sent for the record of the case in Rolle's Abridgment, and said it did not decide the point mentioned, and so refused to follow that case. But in *Reg.* v. *Inhabitants of the Isle of Ely* (5) it was shewn that the wrong record had been furnished to Lord Ellenborough, so the case before him may be neglected. *Reg.* v. *Inhabitants of the Isle of Ely* (5) shews that it makes no difference whether the cut across the highway is made under express statutory powers or not. Where a company or other persons are empowered to make a cut across a highway their power is always subject to a condition that they shall make and maintain a way for the passage of the King's subjects as convenient as before, and it makes no difference whether the condition is expressed or not. The same principle is stated in *Bury Corporation* v. *Lancashire and Yorkshire Ry. Co.* (6) That was a case under the Railways Clauses Act, but the general principle applies.

There is no doubt that the defendants are liable to repair the approaches. The only question is whether the limit of 300 feet fixed by the Statute of Bridges applies, and it is reasonably clear that it was intended to apply to all bridges. There were statutory bridges then in existence (7), and there is no reason for exempting bridges made under statutory powers.

(1) 1 Roll. Abr. 368, tit. "Bridges."
(2) (1811) 13 East, 220; 12 R. R. 330.
(3) (1811) 14 East, 317; 12 R. R. 529.
(4) (1815) 3 M. & S. 526; 16 R. R. 342.
(5) (1850) 15 Q. B. 827.
(6) (1888) 20 Q. B. D. 485.
(7) See 8 Hen. 6, c. 28.

[They also referred to Pratt on Highways, 13th ed. pp. 78, 79.]

Eve, K.C., and *Vaughan Hawkins*, for the New River Company. There is no ground for the contention that the Statute of Bridges imposed a liability in the case of all future bridges, upon the person liable to repair them, to repair also 300 feet of roadway at each end. The statute was only intended to provide for the repair of certain bridges then in existence. The liability imposed on the New River Company by their charter is to maintain the New River and the bridges. That is a liability capable of easy and reasonable definition. Why should the Statute of Bridges be dragged in to explain it? It cannot apply to bridges constructed under modern statutory authority. The point has been raised in two modern cases, though not expressly decided. In *Nottingham County Council* v. *Manchester, Sheffield and Lincolnshire Ry. Co.* (1) the application of the Statute of Bridges was not directly negatived; but the rule laid down that the extent of liability is to be measured by the amount of interference with the highway is inconsistent with the application of the statute.

Rex v. *Staffordshire and Worcestershire Canal Co.* (2) was an indictment for non-repair of a bridge and "certain parts of the highway adjoining the east and west ends of the bridge and distance of 300 feet thereof." Wright J. refused to decide the question as to the statute, and amended the indictment by substituting for 300 feet distances for which it was admitted the approaches to the bridge were out of repair.

The case of *Reg.* v. *Lincoln Corporation* (3) shews that the rule of the statute only applies where there is no evidence to the contrary. Evidence might be produced of a long course of repairing a part of the highway less than the statute requires, and therefore the rule cannot be universal.

Danckwerts, K.C., in reply.

July 16. SWINFEN EADY J. The question remaining for decision in this action is whether the defendants, the New River Company, are liable to maintain and keep in repair the

(1) (1894) 71 L. T. 430. (2) (1901) 65 J. P. 505.
(3) 8 Ad. & E. 65; 47 R. R. 484.

SWINFEN EADY J.
1904
HERTFORDSHIRE COUNTY COUNCIL v. NEW RIVER COMPANY.

roadway at either end of their bridges to the extent of 300 feet adjoining the ends of such bridges, or whether the defendants are only liable to maintain the bridges and the approaches, leaving the question what the extent of the approach is to be dealt with as a matter of fact in each case. The defendants admit the latter liability, but they deny that they are liable in every case to maintain 300 feet measured from each end of the bridge. The plaintiffs base their contention on the Statute of Bridges of Henry VIII. [His Lordship stated the effect of the various Acts relating to the New River and the charter of the company as above, and proceeded:—]

Now upon these facts it is contended that upon the true construction of the statute of Henry VIII. the defendants are liable for maintaining the 300 feet from each end, and the case is put in this way. By the common law where a person cuts through a highway, even although empowered to do so by statute, there is an obligation imposed upon him, even if the statute is silent on the subject, to make good the passage for all the King's subjects as good as it was before he interfered with the highway. That therefore requires him to make a bridge for the passage of people, and carriages where it is a carriage-way, and to maintain it for all time. Then it is said that the liability at common law being to maintain the bridge and its approaches, the statute of Henry VIII. fixed the extent of the approaches by a hard and fast line to govern every case, instead of its being left to be determined as a matter of fact in each case what the extent of the approach is which the bridge builders are liable to maintain. The statute of Henry VIII. itself does not in terms contain any such provision; but that statute has been the subject of judicial interpretation from time to time, and the contention is that, having regard to that interpretation, it is within the intendment and prevision of the statute that persons and corporations becoming liable to repair the bridge, whether ratione tenuræ or by prescription or otherwise, including a case like the present where they have cut through a highway, should be bound by the rule laid down in the statute.

Numerous cases have arisen from time to time upon the

construction of the statute. In 1806 there was a case of *Rex* v. *Inhabitants of the West Riding of York* (1), in which it was determined that where the inhabitants of a county, or of a division or riding of a county, are liable to the repairs of a public bridge, they are liable also to the repair, to the extent of 300 feet, of the highway at each end of the bridge; and if indicted for that non-repair, they can only exonerate themselves by pleading specially that some other is bound by prescription or tenure to repair the same. The bridge in that case, called the Tame Water Bridge, was a bridge erected long after the statute of Henry VIII.; it was the third of three Tame Water Bridges; the first two had been swept away, and a dispute arose with regard to the non-repair of the third bridge. All of the bridges were erected some time in the eighteenth century, the first about the year 1750 or shortly afterwards.

Then cases arose where bridges had been made by navigation companies under statutory powers, and those cases divide themselves into two classes. The first is where the Act requires the navigation company to place a bridge in as convenient a place and so as to make the highway as convenient as before they interfered with it; and the second where the statute is silent with regard to any substituted provision, and the company is bound by the common law. An instance where a navigation company was required to make bridges by the Act which gave them power is *Rex* v. *Inhabitants of Kent*. (2) There the Medway Navigation Company were empowered under a local Act to make the river Medway navigable to take tolls, and then the words of the Act were: "And to amend or alter such bridges or highways as might hinder the passage or navigation leaving them or others as convenient in their room." It was held in that class of case that the liability to repair is upon the navigation company, and not upon the inhabitants of the county at large.

An instance of the second class where the Act is silent as to this liability was *Rex* v. *Kerrison*. (3) In that case certain

(1) 7 East, 588; 8 R. R. 688; 14 R. R. 751.

(2) 13 East, 220; 12 R. R. 330.

(3) 3 M. & S. 526, 532; 16 R. R. 342.

SWINFEN EADY J.
1904
HERTFORDSHIRE COUNTY COUNCIL v. NEW RIVER COMPANY.

persons were appointed commissioners for making navigable the river Waveney from Beccles to Bungay, and they were authorized to cut the soil of any persons for making a new channel and so on, and by virtue of their powers they made a cut through a highway, rendering it impassable, and a bridge was built over the cut, over which the public passed, and it was held that the proprietors of the navigation were the persons who were liable to repair the bridge. Le Blanc J. said: "The proprietors had a right to make a cut through the highway, and so far were not wrong-doers: but if they had left it so, I conceive they would have been wrong-doers, and might have been indicted." To take another illustration, in *Reg.* v. *Inhabitants of the Isle of Ely* (1), where the question was whether the Commissioners of Bedford Level or the inhabitants of the Isle of Ely were liable to repair a bridge, the defendants had put in a plea raising the question, to which the Crown demurred. Patteson J. said, in delivering judgment: "As the first count has shewn the defendants liable primâ facie, the question on this plea will be, whether it shews any other party really liable." . . . . "Now the plea shews a highway interrupted, and an artificial drain or river made across it, for the use, profit and advantage of the Adventurers, the necessity for a bridge thereby created, and the bridge in consequence constructed on the line of the former highway by them, and the former highway thenceforward and now carried upon the bridge." Then a little later on he said: "It appears to us that, when the Adventurers first cut the drain, and interrupted the public highway, that act, however authorized by commissions of sewers or other power vested in them, was done for their own use, benefit and convenience, and could be legal only on the condition of substituting another highway, which could be only by a bridge, as convenient for the public as the old one; that the public were in truth no gainers by the change; they were by this hypothesis merely placed in the same situation as before; and that the condition which was necessary to legalise the first cutting of the drain was and is a continuing one; the instant it is broken, the

(1) 15 Q. B. 827, 840, 844.

indefeasible rights of the public revive, and the cut becomes a nuisance." The Court held that the plea was good, and on the facts being proved the inhabitants of the Isle of Ely would be exonerated from the repair of the bridge.

It will be observed that in these cases to which I have last referred no question was raised with regard to the extent of the liability, whether it was a liability to repair the bridge and approaches, or 300 feet from either end. So far as can be gathered from the report of those cases, no reference was made to the 300 feet.

Then there is another case in which reference to the 300 feet was made, and that is *Reg.* v. *Lincoln Corporation.* (1) There was a question of the liability of the corporation of Lincoln to repair by prescription a certain bridge, and it was held in that case that where a party is liable by prescription to repair a bridge he is also primâ facie liable to repair the highway to the extent of 300 feet from each end, and it was so adjudged.

So far, the decisions upon the statute of Henry VIII. shew that the Statute applies to a case where the county at large is liable to repair a bridge, and where a party is liable to do so by prescription, and I think the reasoning would also obviously extend to a case where the party is liable ratione tenuræ. Still, the question remains open whether where a party is liable under an Act of Parliament subsequent to the statute of Henry VIII. his liability still extends to the 300 feet.

The question has twice been raised in modern times. In *Nottingham County Council* v. *Manchester, Sheffield and Lincolnshire Ry. Co.* (2) there was a special case stated to determine the question whether the railway company were liable to repair the approaches to a bridge. In the special case, after putting forward the contention that the company were bound to repair the approaches, the plaintiffs added: "It is further contended by the plaintiffs that the defendants are by common law bound to repair the highway for a distance of 300 feet from each end of the bridge." The defendants

(1) 8 Ad. & E. 65; 47 R. R. 484. (2) 71 L. T. 430.

SWINFEN EADY J.
1904
HERTFORDSHIRE COUNTY COUNCIL v. NEW RIVER COMPANY.

admitted their liability to repair the bridges, but contended that they were not liable to maintain or repair any other part of the raised approaches. There the question submitted to the Court was whether the defendants were legally liable to maintain and repair the raised approaches. No question was in form submitted as to whether the defendants were liable to repair to the extent of 300 feet.

The Divisional Court (Mathew and Kennedy JJ.) held that the railway company were liable to repair the approaches as part of the bridge. Mathew J. said: "The particular bridge which was made over the canal was on a higher level than the highway leading up to the spot in question, and so it became necessary to carry the bridge over the canal, and to do that, and for the convenient passage, it was necessary to provide approaches of a higher level than the former, of 180 feet on the south side of the canal and 174 feet on the north side. That was the bridge perfected and made under the provisions of the Act of Parliament." Then the Court considered upon whom was the obligation of repairing those approaches, and the conclusion was that the defendants were liable. That case is rather against the plaintiffs than in their favour. True it is that the point was not decided in terms, and although mentioned in the special case was not formally raised in the question submitted to the Court; but if the defendants were liable to repair to the fixed limit of 300 feet from each end of the bridge, it would not have been necessary to consider the limits of the raised approach, or whether it in fact formed part of the approaches to the bridge. If the present plaintiffs' contention was right, the short answer to the case would have been: "It is within the fixed limit of 300 feet from each end of the bridge, and, therefore, under the Statute of Bridges you are bound to maintain it. It is to be treated as part of the bridge, and it is not necessary for us to consider any of the facts with regard to it."

The point was raised again in *Rex* v. *Staffordshire and Worcestershire Canal Co.* (1) by the indictment. But Wright J.

(1) 65 J. P. 505.

expressly stated that he did not mean to decide it, and the indictment was amended so as not to raise the question. That case, therefore, is not a decision either way.

Under those circumstances I have to determine whether the defendants are liable to repair to the extent alleged. This is a case in which the liability to erect a bridge is not left to the common law, but is imposed by the statute. It is not like one of the cases to which reference was made, where the word in the statute was that the company were "authorized" to make a bridge. The Court doubted whether the words authorizing them to make a bridge would be sufficient to impose upon them a liability to make it. But that is not the language of this statute. This statute enacts that "the mayor, commonalty, and citizens of London," the predecessors of the defendants, "and their successors for ever, shall make and maintain at their costs and charges from time to time, convenient bridges and ways for the passage of the King's subjects, and their cattle and carriages, over or through the new cut or river, in places meet and convenient." In my opinion, where a statute passed so recently as the time of James I. empowers a company to interfere with the highway by making cuts across it, but requires them to make and maintain convenient bridges and ways, the expression "bridge" as used in the statute does not necessarily mean a bridge with the approaches defined by the statute of Henry VIII.—that is to say, a bridge and approach to the extent of 300 feet from each end. In my opinion the liability of the defendants in the present case is to be measured by the terms of the statute. Their liability is imposed by s. 6, and according to the true construction of that section I am of opinion that the company is bound to maintain for ever convenient bridges and ways, but is not under an obligation to maintain the approaches for the full distance of 300 feet as determined by the statute of Henry VIII. It would be a modern extension, for which no precedent is to be found in the books, so far as search has been made, of the statute of Henry VIII. to hold, as practically I should have to hold in order to decide in favour of the plaintiffs, that wherever a subsequent statute has imposed upon a company or person the

SWINFEN EADY J.
1904
HERTFORDSHIRE COUNTY COUNCIL v. NEW RIVER COMPANY.

obligation of making and maintaining bridges over the highway, it has ipso facto imposed upon them the obligation of repairing the approaches to the extent of 300 feet on either side. From the time of Henry VIII. to the present time it has never been so held; and I am of opinion that I am not entitled so to extend the operation of that ancient statute in a case where the obligation to make the bridge is imposed by the statute which enables the interference to be made with the highway. I must decide that the defendants are bound to repair and keep in repair the bridges and arches, and other parts thereof and approaches thereto, the extent of which must be determined as a matter of fact in each case if in dispute, but they are not bound to repair the highway to the extent of 300 feet on either side.

Solicitors: *R. A. Read, for C. E. Longmore, Hertford; Thompson & Debenhams.*

J. R. B.

MELLOR *v.* WALMESLEY.

SWINFEN EADY J.

[1903 M. 1165. Liverpool.]

1904

Seashore—Foreshore—Conveyance of Land Bounded by Seashore—Parcels—Plan—Dimensions—Boundary Line—Falsa Demonstratio—Evidence—Field-book Entries—Deceased Surveyor—Professional Duty.

July 5, 6, 18.

Conveyance of land bounded "on or towards the west by the seashore" and in other directions by well-defined boundaries:—

Held, that the land conveyed extended to and was bounded by the seashore or foreshore in the strict and legal sense, and that the dimensions stated in the parcels and plan, and the western boundary line marked on the plan, so far as inconsistent with this construction, must be rejected as falsa demonstratio.

Field-book entries made by a deceased surveyor for the purpose of a survey on which he was professionally employed are not entries in the discharge of professional duty within *Price* v. *Earl of Torrington*, (1703) 1 Salk. 285, and are not admissible in evidence.

WITNESS ACTION.

In 1864 Nicholas Blundell owned a tract of land bounded by the foreshore at Blundellsands.

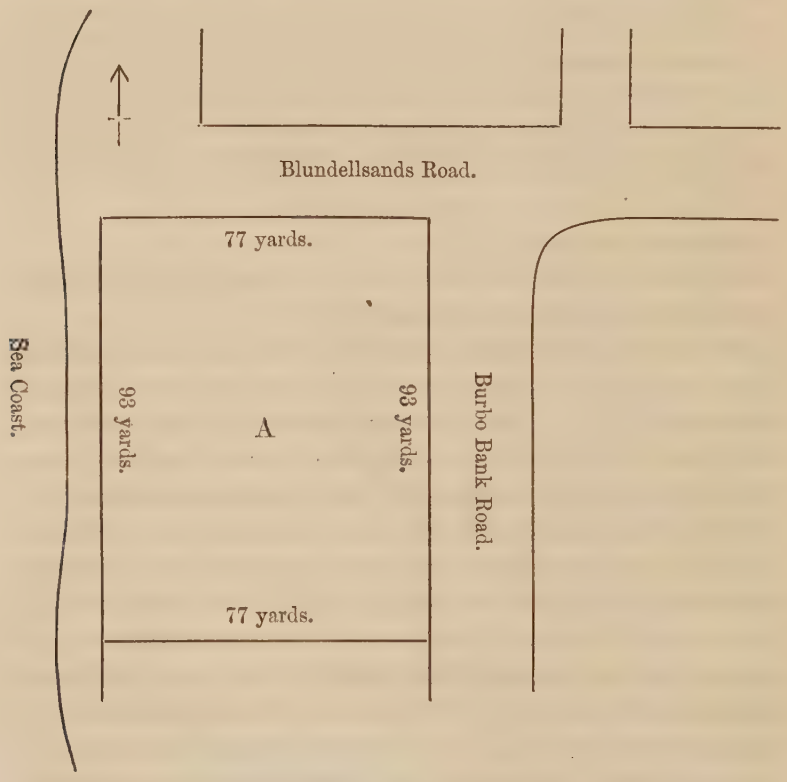
By an indenture dated July 30, 1864, and made between Nicholas Blundell of the one part and James Mellor, the predecessor in title of the plaintiffs Mellor, of the other part, Nicholas Blundell conveyed a piece of the land to James Mellor, his heirs and assigns, by the following description:—

"All that piece of land situate on the seashore at Blundellsands, in the township of Great Crosby, in the county of Lancaster, and measuring in front thereto 93 yards or thereabouts, on the eastern boundary 93 yards or thereabouts, and running in rear or depth backwards on the north and south sides thereof respectively 77 yards or thereabouts, and containing in the whole 7161 superficial yards or thereabouts, be the said several dimensions and admeasurements respectively a little more or less, which same piece of land is bounded on or towards the south by other land of the said Nicholas Blundell, on or towards the east by an intended new road of 15 yards in breadth to be called 'Burbo Bank Road,' on or

SWINFEN EADY J.
1904
MELLOR v. WALMESLEY.

towards the north by Blundellsands Road, and on or towards the west by the seashore, which piece of land hereinbefore expressed to be hereby granted is more particularly delineated in the plan drawn on the back of these presents, and therein marked with the letter A."

The plan shewed a rectangular piece of land with the exact dimensions given in the parcels figured upon it, and also shewed a small strip some 10 feet in width intervening between the western boundary of that rectangular piece of land and a thick black wavy line, beyond which the words "sea coast" were written. The following is a rough sketch.



Weston House was built on this plot in 1877.

By an indenture dated October 17, 1864, and made between Nicholas Blundell of the one part and Thomas Huntington, the predecessor in title of the plaintiff Brown, of the other part,

Nicholas Blundell conveyed a similar plot to the south of Mellor's plot to Thomas Huntington, his heirs and assigns, by a similar description and plan (mutatis mutandis).

Blundellsands House was afterwards built on this plot, the foundations being laid shortly after March 7, 1865.

After the dates of the above conveyances the sea gradually and imperceptibly receded and left a quantity of land on the west side of the premises uncovered.

In October, 1902, the defendants, who derived title under Nicholas Blundell, inclosed part of the land left bare outside the narrow strip.

The plaintiffs, who claimed the land as an accretion to their own property, brought this action for a declaration that their land was bounded on the west by the seashore, i.e., the foreshore, and for consequential relief.

The plaintiffs' witnesses proved that in 1864 the spring tides came close up to the plaintiffs' boundary, and exceptionally high tides washed over part of the land. They admitted, however, in cross-examination that there was a difference of something like 400 feet between spring and medium tide, and that the latter never came anywhere near the boundary.

The defendants sought to identify the wavy line as the high-water mark of ordinary spring tides in 1864. For this purpose they tendered in evidence a field-book containing levels and other figures entered at that date by the late Alfred Taylor, C.E., who had contracted with the Great Crosby Local Board to make a survey and take the levels for the purpose of a drainage scheme.

His pupil, George W. Goodison, C.E., had made the plans and sections at the time from the field-book, but was unable to verify the figures. The defendants, therefore, tendered the field-book itself. The plaintiffs objected.

Levett, K.C., and *O. L. Clare*, for the defendants. These entries were made by Mr. Taylor "in the ordinary course of business, and in the discharge of professional duty, at or near the time when the matter stated occurred, and of his own

SWINFEN EADY J.
1904
MELLOR v. WALMESLEY.

knowledge." They are, therefore, admissible: Stephen on Evidence, 6th ed. art. 27; *Price* v. *Earl of Torrington*. (1) "Duty" must include "contractual duty."

SWINFEN EADY J. A mere entry or memorandum made by a deceased surveyor for the purpose of a survey on which he was professionally employed does not come under that rule. It is not the record of a fact, made at the time when the fact it records took place. The evidence is not admissible.

Neville, K.C., Eve, K.C., and *Courthope Wilson*, for the plaintiffs. The only question is whether the plaintiffs' property extends to the foreshore, as if so the accretion clearly belongs to them: *Scratton* v. *Brown* (2); *In re Hull and Selby Ry. Co.* (3) Foreshore and seashore mean the same thing, namely, the ground from time to time between the ordinary high-water and low-water mark: Hale, De jure maris, p. 12; Moore on the Foreshore, pp. 378, 674; *Attorney-General* v. *Chambers* (4); *Scratton* v. *Brown*. (2) Foreshore is merely a more modern word first applied to tidal rivers, and afterwards used generally. In the present case the parcels describe the property as bounded by the seashore, and any inaccuracy in the measurement may be rejected as falsa demonstratio: *Llewellyn* v. *Earl of Jersey*. (5)

Again, so far as there is a discrepancy between the plan and the parcels, the parcels must prevail: *Horne* v. *Struben*. (6) If, therefore, the wavy line does not represent the foreshore boundary, it is wrongly drawn and may be disregarded. In any case, the defendants are estopped from denying that the plaintiffs' property extends to the seashore: *Roberts* v. *Karr* (7); *Espley* v. *Wilkes* (8); *Furness Ry. Co.* v. *Cumberland Co-operative Building Society* (9); *International Tea Stores Co.* v.

(1) 1 Salk. 285; 2 Sm. L. C. 11th ed. 320.
(2) (1825) 4 B. & C. 485, 498; 28 R. R. 344.
(3) (1839) 5 M. & W. 327, 332; 52 R. R. 733.
(4) (1854) 4 D. M. & G. 206.
(5) (1843) 11 M. & W. 183, 189; 63 R. R. 569.
(6) [1902] A. C. 454, 456, 457.
(7) (1809) 1 Taunt. 495, 502, 503; 10 R. R. 592.
(8) (1872) L. R. 7 Ex. 298, 303.
(9) (1884) 52 L. T. 144.

Hobbs. (1) There is nothing in the conveyance to suggest that it was bounded on the west by the grantor's land.

Levett, K.C., and *O. L. Clare*, for the defendants. The plaintiffs contend that seashore is a technical word identical with foreshore. This is a fallacy. Primâ facie it is a popular term like sea coast, without any very definite meaning. But even in a technical sense it is ambiguous, as it may mean the shore bounded by the equinoctial spring tides, the bi-monthly spring tides, or the ordinary or neap tides: Hale, De jure maris, p. 25; Moore on the Foreshore, p. 392; *Reg.* v. *Gee*. (2)

Now having regard to the parcels and plan in the present case, it is clear that seashore was used in its popular sense, and in that sense the property was bounded by the seashore in 1864 in spite of the narrow strip.

Property may be popularly described as bounded by a road although there is an intervening green strip at the side of the road: *Roberts* v. *Karr*. (3)

In *Roberts* v. *Karr* (3) and *Espley* v. *Wilkes* (4) the grantor was no doubt estopped from denying access to the road, but there was no question of enlarging the parcels. The use of the word "road" implied a right to walk over it, but there is no such implication in the word "seashore": *Blundell* v. *Catterall*. (5) The ambiguity of the word precludes any estoppel, and the conveyances only passed the land down to the narrow strip.

Suppose, however, that the parcels were enlarged by the description of the boundary, and the land extended to the actual seashore of 1864. What seashore did it extend to? Surely the seashore indicated by the wavy line. This line may possibly not represent the exact spring-tide high-water mark of 1864, though in all human probability it was intended to do so. But it cannot possibly represent the foreshore boundary as defined by the medium high-water mark. The medium tide never came anywhere near the property or the

(1) [1903] 2 Ch. 165, 173.
(2) (1859) 1 E. & E. 1068, 1070.
(3) 1 Taunt. 495, 502, 503; 10 R. R. 592.
(4) L. R. 7 Ex. 298, 303.
(5) (1821) 5 B. & Al. 268; 24 R. R. 353.

SWINFEN EADY J.
1904
MELLOR v. WALMESLEY.

wavy line. It is not alleged that the ordinary spring tide washed over the property, so that the medium tide must have been some 400 feet away. It is not a question of a narrow strip. If the plaintiffs are right, the conveyances passed more than double the amount of land indicated in the plan and parcels. The doctrine of falsa demonstratio has never been carried to that length.

Neville, K.C., in reply.

Cur. adv. vult.

July 18. SWINFEN EADY J. (after stating the facts). It is clear from the case of *In re Hull and Selby Ry. Co.* (1) that in all cases of gradual accretion which cannot be ascertained from day to day the land so gained goes to the person to whom the land belongs, to which the accretion is added, and vice versâ, both as between subject and subject and as between Crown and subject. In that case Alderson B. said: "Suppose the Crown, being the owner of the fore shore—that is, the space between high and low water mark—grants the adjoining soil to an individual; and the water gradually recedes from the fore shore, no intermediate period of the change being perceptible; in that case the right of the grantee of the Crown would go forward with the change. On the other hand, if the sea gradually covered the land so granted, the Crown would be the gainer of the land."

The question, therefore, is—To whom does the land belong to which the accretion has been added? It was contended on behalf of the defendants that, although the parcels in the conveyance describe the land as bounded on or towards the west by the seashore, the word seashore was not used in its more restricted sense, or the third of the three meanings given by Lord Hale in his treatise, De jure maris, p. 25; and, moreover, that the plan on the conveyance shewed a narrow strip of ground, a few feet wide, intervening between the western boundary of the land conveyed, and a thick black wavy line with the words "sea coast" written just beyond it, which indicated that the grantor did not intend granting the land

(1) 5 M. & W. 327, 332; 52 R. R. 733.

right down to the water, the land conveyed being described and shewn on the plan by exact dimensions, which were satisfied without including the additional strip.

The real question is whether, according to the true construction of the deed, the land conveyed extends to the boundary of what is in legal intendment the seashore, namely, that portion only of the land adjacent to the sea which is alternately covered and left dry by the ordinary flux and reflux of the tides. It was established in *Attorney-General* v. *Chambers* (1) that, in the absence of all evidence of particular usage, the right of the Crown to the seashore landwards is primâ facie limited by the line of the medium high tide between the springs and the neaps. This is the seashore or foreshore which is ordinarily and primâ facie vested in the Crown, subject to the rights of the King's subjects of fishing and navigation. In my judgment it is in this sense and meaning that the word is used in the conveyance, where the land conveyed is expressed to be situate on the seashore, measuring in front thereto 93 yards or thereabouts, and bounded on or towards the west by the seashore. The intention of the grantor to be gathered from the language used in the deed was to convey the land between the Burbo Bank Road on the east and the seashore on the west, otherwise the western boundary would have been described not as the seashore, but as other land of the grantor.

The defendants contended that the thick black line shewn on the plan on the conveyance was the high-water mark of ordinary spring tide—that is, the bi-monthly spring tide occurring at full and change of the moon, and that the line of high-water ordinary tide was 400 feet away. The defendants were, however, unable to prove the line of high-water ordinary spring tide. They called for that purpose Mr. Goodison, a civil engineer and surveyor, formerly practising at Liverpool; but it appeared from his examination that he was unable to verify the figures of the survey and levels which were taken by his principal, Mr. Taylor. The actual line of high-water spring tide or high-water medium tide in 1864 at the spot in question has not been proved.

(1) 4 D. M. & G. 206.

SWINFEN EADY J.
1904
MELLOR v. WALMESLEY.

Even if the defendants had succeeded in shewing that the thick black line on the plan was the line of high-water spring tide in 1864, it would not have been of much assistance for the purpose of explaining the plan and reconciling it with the parcels in the deed, as there was still the intervening strip of ground to explain and account for. According to the plan, the land would not even then be bounded on the west by the seashore, assuming that the seashore extends landwards to the limit of high-water spring tides. There are still higher tides—twice a year—at the equinoxes; but according to the evidence these tides about the date of the conveyances and afterwards came considerably above the thick black line and above the strip, for Mr. John Alfred Huntington remembered Blundell-sands house being built, and when the first bricks were being laid on the site where the house itself still stands the tide surrounded the people, who could not leave until it went down, and the bricks were laid where the tide had been. This was on a very calm day with no wind. As the plans for that house were passed by the local board on March 7, 1865, this incident probably took place at the spring tides occurring at the vernal equinox in that year. With regard to the other plot, upon which the house was not built until much later, Mr. James Mellor remembered seeing the sea come over a portion of the garden several times after Huntington's wall was built. These exceptional high tides came over a portion of the plots, which on any construction of the deed are included in the land conveyed.

The result is that no one of the three meanings of the word "seashore" given by Lord Hale would make the description of the property as contained in the parcels accurately fit in and accord with the plan. The intervening strip, to which the defendants attach so much importance, would prevent the land being bounded by the seashore. Having regard to the description of what was intended to be conveyed—namely, a piece of land on the seashore—and to the east and west boundaries being given—namely, Burbo Bank Road and the seashore—I am of opinion that the deed contains an adequate and sufficient definition, with convenient certainty of what was

intended to pass by it—namely, all the land between the Burbo Bank Road and the seashore, or foreshore, in the strict and legal sense and meaning; and, accordingly, that any erroneous statement as to dimensions or quantity or any inaccuracy in the plan will not vitiate the description or have any effect: see *Morrell* v. *Fisher* (1); *Doe* v. *Galloway* (2); *Llewellyn* v. *Earl of Jersey* (3); *Horne* v. *Struben* (4); Sheppard's Touchstone, 247.

I therefore decide that by the two conveyances the grantees acquired all the land of the grantor between the Burbo Bank Road and the seashore, and that the accretion to this land belongs to them; and that the western boundary of their land remains to-day what it was on the day of the grant—namely, the seashore. The result is that the plaintiffs succeed, and there must be a declaration as asked.

Solicitors: *Sharpe, Parker, Pritchards, Barham & Lawford, for Payne, Frodsham & Bewley, Liverpool; Rowcliffes, Rawle & Co., for Weld & Thomson, Liverpool.*

(1) (1849) 4 Ex. 591, 604.
(2) (1833) 5 B. & Ad. 43, 51; 39 R. R. 381.
(3) 11 M. & W. 183, 189; 63 R. R. 569.
(4) [1902] A. C. 454.

G. R. A.

FARWELL J.

1904

March 10, 11, 12, 14; *June* 14, 15, 16, 17, 25.

MERCER *v.* DENNE.

[1902 M. 417.]

Custom—Validity—Custom to dry Fishing Nets—Changes in User—Encroachment and Recession of Sea—Accretion—Land added by Accretion subject to Custom—Evidence—Public Documents—Ancient Reports to Government Departments—Depositions—Maps and Charts.

A custom for fishermen to spread their nets to dry on the land of a private owner at all times seasonable for fishing is a good and valid custom. Such a custom may be established by evidence of user though the periods of user, and the number and character of the nets dried, may have varied from time to time.

Where the sea has gradually receded, land added by accretion takes the character of, and becomes subject to the same customs as, the land to which it is added.

In order to be admissible in evidence as a public document, a document must be made for the purpose of the public making use of it and of being kept public so that the persons concerned may have access to it. Reports made to a department of the Government, and maps or plans made for the use of the department, are not admissible as public documents. Depositions made in an action where public rights are in question are admissible against strangers in any case where evidence of reputation is admissible, but only if they speak to reputation, not if they merely state particular facts. Charts prepared by persons employed by the Admiralty for the use of the navy and merchants are admissible in evidence, but a chart prepared by a private person is not admissible merely because it comes from the custody of the Admiralty.

THE plaintiffs in this action were two inhabitants of the parish of Walmer in the county of Kent, carrying on there the business of fishermen, suing on behalf of all other persons carrying on the same business in the parish of Walmer.

They alleged that there was in the said parish a piece of ground covered with shingle (thereinafter called the beach ground) situate near the sea and lying between the grounds of a messuage known as Walmer Place on the north, the grounds of Walmer Castle on the south, the foreshore on the east, and a public road called Wellington Road on the west, and containing eleven acres or thereabouts. And that from time immemorial there had been an ancient and laudable custom within the said parish of Walmer that all persons

inhabitants of the said parish carrying on the trade or business of fishermen might use, have, and exercise, and all such persons as aforesaid had from time immemorial used and of right had exercised the right and privilege at all times necessary or proper for the purposes of the trade or business of a fisherman to dry their nets upon the beach ground, and for that purpose to spread such nets on the surface thereof.

The defendant was the owner of the beach ground, and intended to erect buildings thereon. The plaintiffs claimed a declaration of right in the terms of the custom alleged, and an injunction to restrain the defendant from building on or otherwise dealing with the beach ground so as to prevent, disturb, or interfere with the exercise by the plaintiffs, and other persons entitled, of the alleged right.

The defendant denied that the alleged custom existed, and alleged that no such custom could be legal or enforceable; and that such user as there had been, if any, was occasional and discontinuous, and had not been limited to inhabitants of Walmer, and had been permissive and not of right; that the persons on whose behalf the right was claimed were fluctuating, uncertain, and unascertainable; and that the alleged right was not reasonable, and would prevent the user of the land for any other purpose.

It was proved by the plaintiffs' witnesses that during the whole of their memory, a period extending over more than seventy years, and by reputation for many years before their birth, the inhabitants of the parish of Walmer, who were fishermen, had used the ground in question for drying their nets. The user had varied to some extent. There were three fisheries now practised in Walmer—the mackerel fishery, for which the season was from May to July and in September and October, the herring fishery from October to Christmas, and the sprat fishery from November to March. Down to some thirty or thirty-five years before the commencement of this action the herring and mackerel nets were "cutched" or tanned before, and in preparation for, the fishing season, and were then spread out to dry upon the piece of ground in question; and at the end of the season the boats were brought up close

FARWELL J. 1904 MERCER v. DENNE.

to this piece of ground, and the nets taken directly to it and spread out to dry before being put away: this practice still prevailed with regard to the mackerel nets. Until about the same period sprat nets were not spread out upon the beach ground. About thirty or thirty-five years before this action a practice of oiling instead of cutching the herring nets and of oiling the sprat nets came into use, and nets of both these kinds were spread out on the beach ground to dry after oiling. The time required to dry after oiling was longer than that required after the earlier process, and the sprat nets were spread out to dry at some times of the year at which no nets had been spread before within living memory. Nets had sometimes been spread on other parts of the beach, but the beach ground had always been used, sometimes to the extent of covering the whole surface, and was known to the fishermen, and spoken of amongst them, as their own ground.

Upjohn, K.C., and *R. J. Parker*, for the plaintiffs. A custom for fishermen to dry their nets upon the land of another is good, because it is in favour of fishing and navigation. There is no direct authority on the point, but in all text-books, and in the arguments of counsel and in dicta of judges, from the earliest times such a custom is referred to as valid: Year Book, 8 Edw. 4, p. 18, 19; Bro. Abr. Custom, pl. 46; 7 Viner's Abr. Customs, p. 183; *Blundell* v. *Catterall* (1); *Fitch* v. *Rawling* (2); *Baker* v. *Brereman* (3); Bacon's Abr. Customs, p. 566; the case of *Tanistry* (4); and though the right is claimed by way of custom, yet it is in the nature of an easement in gross, and falls within s. 2 of the Prescription Act, if it is reasonable and a right of utility and benefit: *Pain* v. *Patrick* (5); *Linn-Regis Corporation* v. *Taylor* (6); *Mounsey* v. *Ismay* (7); *Tyson* v. *Smith* (8); *Lockwood* v. *Wood* (9);

(1) (1821) 5 B. & Al. 268, 295–7; 24 R. R. 353.
(2) (1795) 2 H. Bl. 393, 398; 3 R. R. 425.
(3) (1635) Cro. Car. 418.
(4) (1608) Davies Rep. 78.
(5) (1690) 3 Mod. 289, 294.
(6) (1684) 3 Lev. 160.
(7) (1865) 3 H. & C. 486.
(8) (1838) 9 Ad. & E. 406; 48 R. R. 539.
(9) (1841–4) 6 Q. B. 31, 64–5; 66 R. R. 265.

Race v. *Ward*. (1) The evidence shews that during the last thirty or thirty-five years there has been a variation in the method of preparing and in the kind of nets used, but there is no authority restricting the user to particular kinds of nets. In the course of time there must be variation in the custom, having regard to modern improvements and the exigencies of trade, and there is no evidence that the burden has been increased except by variation in the kind of nets and in the oiling. The class of cases nearest to the present is that of recreation grounds.

Eve, *K.C.*, *Gatey*, and *Stuart Moore*, for the defendant. The word "custom" in s. 2 of the Prescription Act does not extend to such a right as is claimed in this action. It is not an easement. To be within s. 2 of the Act the right claimed must be a right of utility and benefit, and not one of mere recreation and amusement: *Bailey* v. *Stephens* (2); *Mounsey* v. *Ismay*. (3) The "semble" in the head-note of *Mounsey* v. *Ismay* (3) has not been adopted: *Shuttleworth* v. *Le Fleming*. (4) There must be a dominant and servient tenement to support an easement under s. 2 of the Act, and there is no such thing as an easement in gross: per Lord Cairns L.C. in *Rangeley* v. *Midland Ry. Co.* (5) The law as to custom is well summarized by Jessel M.R. in *Hammerton* v. *Honey*. (6) Custom is proved by usage. Here the right claimed is too wide. It practically excludes the owner from any enjoyment of his land. The present user is far in excess of the old user simply to dry nets, for until some thirty years ago there was no user at all for sprat nets. Further, the user now claimed is not intermittent, as before, for a few days to dry nets, but for periods of some weeks after nets have been oiled. Such a user is excessive and unreasonable and bad: *Dyce* v. *Hay*. (7)

[FARWELL J. referred to *Hall* v. *Nottingham*. (8)]

There the custom was reasonable. Here the claim is too wide, and the method of treating the nets in recent years

(1) (1855) 4 E. & B. 702, 710.
(2) (1862) 12 C. B. (N.S.) 91.
(3) 3 H. & C. 486.
(4) (1865) 19 C. B. (N.S.) 687.
(5) (1868) L. R. 3 Ch. 306, 310.
(6) (1876) 24 W. R. 603.
(7) (1852) 1 Macq. 305.
(8) (1875) 1 Ex. D. 1.

FARWELL J. 1904 MERCER v. DENNE.

causes a much greater use of the land and increases the burden on it. Further, the user proved is a limited user before and after the fishing season. Therefore the custom is not a right to use the land "at all times," but an intermittent user, and must be restricted to a limited period before and after each fishing season. Also the user has not been "continuous," because the nets are now oiled instead of being dried as they used to be. Therefore oiling the nets is not within the custom, and should be excluded.

Upjohn, K.C., in reply. Sect. 2 of the Prescription Act is not limited to rights of way and water: *Dalton* v. *Angus* (1); *Bass* v. *Gregory*. (2) Our custom is not unreasonable or too large, and cannot be limited in the way suggested. To restrict the fishermen to the old method would make the custom useless, because it would prevent them from adopting and using improved methods of fishing, and would be prejudicial to the trade. The observations in *Dyce* v. *Hay* (3) are in our favour.

Eve, K.C. I ask for leave to amend the defence by adding a plea that the land in question has within living memory been covered by the sea, and is an accretion to the land of the manor, and therefore has not been from time immemorial subject to the user claimed by the plaintiffs.

Upjohn, K.C., opposed.

FARWELL J. gave leave to both parties to amend; and it was arranged that the case should stand over for amendment of pleadings and further argument after the reply was concluded.

Upjohn, K.C. The custom is always referred to in the books as a custom to dry nets, not to dry such nets as were in use before the time of legal memory.

In *Fitch* v. *Rawling* (4) a custom was held good for playing all manner of lawful games on the plaintiff's close; the particular game in question was cricket, but a right to play football was also claimed. Now cricket was apparently introduced long

(1) (1881) 6 App. Cas. 740, 798.
(2) (1890) 25 Q. B. D. 481, 484.
(3) 1 Macq. 312, 313.
(4) 2 H. Bl. 393; 3 R. R. 425.

after the commencement of legal memory, and if it did exist then it was a totally different game to what it is now or was in 1795. The name cricket appears first in 1550; but it seems to have been previously known as "hand in and hand out," and then to have been played with a hole in the ground for a wicket. It was forbidden under that name in 1477 by the statute 17 Edw. 4, c. 3, one of the statutes for the promotion of archery (Encyc. Brit. vol. vi. p. 578, art. "Cricket"). Football was forbidden for the same reason in 1365 (see Close Rolls, 39 Edw. 3, No. 23; 12 Ric. 2, c. 6; Encyc. Brit. vol. ix. p. 367, art. "Football"). These prohibitions were repealed by 33 Hen. 8, c. 9 (1541). There is some question whether the games were not forbidden again by the same statute; but in any case cricket was an unlawful game from 1477 to 1541, and football for a longer period, and both had completely changed in character. If the defendant's argument is right, the custom upheld in *Fitch* v. *Rawling* (1) must have been bad. It would have been enough to prove that the games were unlawful for a single day or had varied in character in any way.

In the case of an easement, a carriage-way once established may be used for all sorts of carriages: *Cowling* v. *Higginson.* (2) That case has been somewhat modified by *Wimbledon and Putney Commons Conservators* v. *Dixon* (3), but only in cases where a change in the user of a dominant tenement imposes a largely increased burden on the servient tenement.

June 14. The case now came on again upon the amended pleadings. The plaintiffs had amended the statement so as to raise a claim under the Prescription Acts.

The defendant had amended his defence by alleging that in and prior to the year 1799, and for many years subsequent thereto, the piece of ground in question was below high-water mark and subject to the flux and reflux of the tide, and until comparatively recent years was wholly unsuitable, and in fact incapable of being used, for the purposes alleged; and that the

(1) 2 H. & Bl. 393; 3 R. R. 425. (2) (1838) 4 M. & W. 245; 51 R. R. 555.
(3) (1875) 1 Ch. D. 362.

FARWELL J. 1904 MERCER v. DENNE.

piece of land in question was formed by accretion and the receding of the sea.

FARWELL J. said that on the point as to prescription he was bound by *Shuttleworth* v. *Le Fleming* (1) and *Mounsey* v. *Ismay* (2), and need hear no further argument on the question raised by the defendant; the burden of proof was on him.

Jenkins, *K.C.*, *Gatey*, and *Stuart Moore*, for the defendant. The point is a short one. We propose to prove that this land was at one time below high-water mark and the property of the Crown, and that there has been an accretion by retrocession of the sea, and the land is now part of the manor. If this is so, there cannot have been a custom from time immemorial, for a custom must attach to a particular piece of land; there can be no right for the custom to attach to land formed by accretion. We propose to prove the fact by means of ancient documents.

[They then tendered the following ancient documents, all produced from the Record Office:—

1. A report made by a surveyor in 1610 by order of the Lord Warden of the Cinque Ports of the repairs at Walmer Castle made necessary by the encroachments of the sea.

2 and 3. Similar reports dated in 1623 and 1625, but with nothing to shew by whom or by whose order they were made.

4. A letter written in 1626 by the captains of Deal and Walmer Castles to a Mr. Nicholas, who "had been recently summoned to the Board of the Privy Council," stating the damage done to these castles by the sea, and asking him to get the attention of the Council to a petition for their repair.

5 and 6. Petitions from the same persons to the same effect to the Privy Council and to the Duke of Buckingham dated 1626 and 1627.

7. An estimate made by the King's engineer for the reparations of Sand-down, Deal, and Walmer Castles, some of the items shewing that damage had been done by the sea.]

Jenkins, *K.C.*, and *Gatey*. These documents are admissible on the ground, first, that they are reports made by officials in

(1) 19 C. B. (N.S.) 687. (2) 3 H. & C. 486.

the course of their duty, and therefore within *Price* v. *Lord Torrington* (1); and, secondly, that they are public documents. The question what are public documents was much discussed in *Sturla* v. *Freccia*. (2) We submit that the effect of Lord Blackburn's judgment in that case is that a document relating to public matters and prepared by a public officer is a public document, and therefore admissible in evidence.

FARWELL J. In my opinion these documents are not admissible in evidence. I adopt the ruling of Lord Blackburn in *Sturla* v. *Freccia* (2): "I understand a public document there to mean a document that is made for the purpose of the public making use of it, and being able to refer to it. It is meant to be where there is a judicial, or quasi-judicial, duty to inquire, as might be said to be the case with the bishop acting under the writs issued by the Crown. That may be said to be quasi-judicial. He is acting for the public when that is done; but I think the very object of it must be that it should be made for the purpose of being kept public, so that the persons concerned in it may have access to it afterwards."

The first of the documents now tendered is a survey taken by some one unknown and presented to the Lord Warden of the Cinque Ports. It does not appear to have been acted upon, and I cannot see any ground upon which I can hold that it is either a public document or comes within *Lord Torrington's Case*. (1) Supposing the present Lord Warden had a survey made for him which was never acted upon, never presented to Parliament, never paid for by anybody but himself, I cannot conceive how that could be said to be a public document. The test of publicity as put by Lord Blackburn is that the public are interested in it, and entitled to go and see it, so that if there is anything wrong in it they would be entitled to protest. In that sense it becomes a statement that would be open to the public to challenge or dispute, and, therefore, it has a certain amount of authority. A mere report to the Lord Warden of the Cinque Ports in 1616 by

(1) (1703) 1 Salk. 285; 2 Ld. Raym. 873.
(2) (1880) 5 App. Cas. 623, 643.

FARWELL J. 1904 MERCER v. DENNE.

an unknown surveyor is absolutely inadmissible. The two next documents appear to be of the same nature, but there is nothing to shew by whom they were made or for what purpose. They are equally inadmissible. The letter to Mr. Nicholas from two gentlemen who are described as captains of Deal and Walmer Castles seems to be a private letter asking him to use his influence to get some money spent on their castles, and cannot be admissible.

The petitions by the same gentlemen to the Privy Council and to the Duke of Buckingham are evidence that petitions were presented, but not of the facts stated therein.

The last document is an estimate for reparations alleged to have been made by the King's engineer. How such a document can be evidence of the facts therein stated I cannot see. I hold, therefore, that none of these documents are admissible.

Jenkins, K.C., and *Gatey*. We now put in an information brought by the Attorney-General in 1639 against certain persons who claimed to be entitled to the manor of Walmer for causing or suffering the destruction of a bank between the sea and Walmer Castle, whereby the King had been put to great expense in protecting the castle from the sea, and the depositions in support thereof which shew that the sea then came close up to the castle. We do not claim that the information is evidence of the facts stated; we only put it in to explain the depositions. They were made in proceedings concerning a public matter, and are admissible against strangers as evidence of reputation in any case in which, as here, evidence of reputation is admissible.

Upjohn, K.C., and *R. J. Parker*, for the plaintiffs. We do not say that evidence of reputation properly so called is not admissible. But these depositions are not evidence of reputation. The information in which they were made raises only a question of the private liability of certain persons to keep up the bank against the sea. It involved no question of public right, and these depositions do not speak to reputation at all: they merely give evidence of particular facts. Evidence of particular facts cannot be admitted as reputation:

Reg. v. *Bliss* (1); Taylor on Evidence, 9th ed. p. 400, pl. 617.

Jenkins, *K.C.*, in reply.

FARWELL J. I am of opinion that these depositions are not admissible. I will assume that this was in the nature of a public right which the Crown was attempting to enforce. It is not very easy to say whether the King in 1625 was attempting to enforce the private right of the Crown, or whether he was suing for the protection of the public, but I will assume it was a public matter. The question is whether the depositions of witnesses taken in that suit are admissible in the present case on the question to what point the sea extended. The depositions of deceased witnesses in other actions are admissible against strangers, amongst other cases, if they relate to a custom where reputation would be evidence; but then those depositions must be depositions of matters of reputation and not of matters of fact. It appears to me to be well settled by the authorities which are referred to in Taylor on Evidence, 9th ed. p. 400, pl. 617, that reputation as to the existence of particular facts is rejected, and the instances that he gives are germane to the present case; perhaps the most germane is *Ireland* v. *Powell*. (2) In that case the question was whether a turnpike stood within the limits of a town, and though evidence of reputation was received to shew that the town extended to a certain point, yet declarations by old people since dead that houses formerly stood where none any longer remained was rejected, on the ground that those statements were evidence of a particular fact.

Now the depositions that I have seen in connection with the interrogatories shew that all the witnesses were speaking to particular facts, and were not speaking to reputation at all. They were not questioned as to reputation, nor did they answer as to reputation. The older witnesses spoke to the existence forty years before they made their depositions of a bank which had since been undermined by coneys and finally

(1) (1837) 7 Ad. & E. 550; 45 R. R. 757.

(2) Cited in *Reg.* v. *Bliss*, 7 Ad. & E. 555; 45 R. R. 762.

FARWELL J. 1904 MERCER v. DENNE.

washed away by the force of the waves. The younger witnesses do not answer the interrogatory about this bank at all. The only evidence given is evidence of particular facts and not of reputation at all, and therefore not admissible.

Jenkins, *K.C.*, and *Gatey* then tendered various ancient maps and plans which were prepared by the directions of the Board of Ordnance in 1641 and 1644 and 1647. These plans are public documents and are admissible as evidence of reputation. The Court will infer that the Board of Ordnance, which was the War Office of that time, would employ competent people to make plans for them.

FARWELL J. The War Office plans are clearly within my previous decision—they are not public documents. So far as they can be treated as evidence at all, they are evidence of particular facts and not of reputation. But the chief ground for not admitting them is that I think it would be most dangerous to admit confidential reports, made to the War Office, or to the Board of Ordnance, as evidence of public rights. The public had no voice in the matter, and the whole gist of the rule as to public documents is that the publicity must be contemporaneous, and publicity means such publicity as would afford the opportunity of correcting anything that was wrong.

[Certain plans and reports made to the Board of Trade were tendered and rejected on the ground that they were confidential documents.

Two charts prepared by direction of the Admiralty were admitted without objection, the defendant's witnesses stating that it was the duty of persons preparing charts for the Admiralty to fix accurately the position on the land of such buildings as Walmer Castle.]

Jenkins, *K.C.*, and *Gatey* then tendered a map or chart made by Charles Labelye. On the face of it was the inscription, "A Mapp of the Downes, much more correct than any hitherto published, shewing the true shape and situation of the coast between the North and South Forelands, and of all the

adjacent sands together with the surroundings at low water, plans of anchorage, and all the necessary leading marks. By Charles Labelye, engineer, published in March, 1837."

[The copy of the chart first tendered was produced from the British Museum, and was rejected upon the ground, amongst others, that it did not come from the proper custody in the sense in which that phrase is used in this Court. It was then discovered that the Admiralty had a copy of the same chart, and this copy was produced and tendered.]

Jenkins, K.C., and *Gatey*, for the defendant. An ancient map has frequently been accepted without objection as evidence of reputation. *Hammond* v. *Bradstreet* (1) is distinguishable; the plan there was rejected because it did not come from proper custody. Plans are part of the common knowledge just as books are. By getting and keeping the chart into use the Admiralty have sanctioned it and given it their authority. The Admiralty have special cognizance of the special subject-matter, and therefore a chart from their custody has authority which it had not when produced from the British Museum, which is a record of all literature.

FARWELL J. In my opinion this map is not admissible. I might perhaps admit it and say that it is valueless; but it comes to the same thing, and I think the true ground is that it is not admissible. It purports to be a "Mapp of the Downes much more correct than any hitherto published shewing the true shape and situation of the coast between the North and South Forelands and of all the adjacent sands," &c. It was prepared for the purpose of shewing how a new harbour could be made between Sandown Castle and Sandwich, and the position of the intended harbour and cuts, and the high-water mark and the low-water mark at a moderate spring tide are shewn at the place where it is material for this purpose that they should be shewn; assuming that proper measurements were made there, Walmer Castle is far away, and there are no

(1) (1854) 10 Ex. 390.

FARWELL J. 1904 MERCER v. DENNE.

marks to shew, nor is it the least probable, that any measurements were made there. Further than that, the man making the map describes himself as an "Engineer, late Teacher of the Mathematicks in the Royal Navy." On the face of it, therefore, he is not a person competent to take the measurements which would be necessary to ascertain the true high-water mark. The map also does not purport to be of his own unaided making, because, so far as the soundings are concerned, he states that he has been assisted by "several able pilots" and "Mr. Phillips, master," of the Royal Navy. The map was made diverso intuitu; it was not the least necessary to shew what the high-water mark was so far to the south as Walmer Castle. I could not place any reliance on it if I did admit it; but, in my opinion, it is not admissible, because it is not shewn to have been made by any competent person, competent to make it quoad the high-water mark and low-water mark; and the fact that it comes from the possession of the Admiralty makes no difference; it is not an Admiralty chart nor has it received the sanction of the Admiralty in any way. The Admiralty are in the habit of acquiring, either by purchase or by gift, or, perhaps I might say, by quasi-inheritance, as from the East India Company, numbers of old charts and maps. That does not make them in any way official; and I have the less hesitation in ruling the map to be inadmissible, because I think it would be absolutely worthless if I did admit it.

Jenkins, *K.C.*, and *Gatey*, for defendant, on the whole case. The charts which have been admitted show clearly that the piece of land in question, or at least a considerable part of it, was below high-water mark within the time of legal memory. That displaces the plaintiffs' contention that they have spread nets there continuously from time immemorial. There cannot be a custom to spread nets over a piece of land if and when it becomes suitable, nor can a custom attach to land added by accretion. If it were possible in law, such a custom would be void as unreasonable. The sea might have gone out for a mile as it has done at Sandwich, and then according to the

plaintiffs' contention the fishermen could claim to spread their nets over a piece of land a mile wide to prevent its being used for any other purpose.

R. J. Parker, for the plaintiffs. The defendant's plea is really not inconsistent with the claim. The claim is for immemorial custom. The proper plea to defeat such a claim is that it commenced within the time of legal memory. The defendant ought to prove that the land was under water in the time of Richard I. The fact that for a certain period within legal memory the right could not be enjoyed to its full extent does not prove that the custom began within the time of legal memory. Interruption is important in a case under the Prescription Act; it is no answer to a claim for common law custom unless it is of such a nature that the Court will infer abandonment.

If there is accretion, the added land must be subject to the same right as that to which it was added. The cases as to accretion generally relate only to freehold owners, but every interest in the land must on principle get the benefit.

In *Foster* v. *Wright* (1) it was held that where a river had encroached upon neighbouring land a private right of fishery followed over the new water, and that whether the owner of the fishery owned the soil or not. That is almost exactly the converse of the present case. In *Hindson* v. *Ashby* (2) Lindley L.J. somewhat modified his judgment in *Foster* v. *Wright* (1), but only as to boundaries.

Jenkins, K.C., in reply on the whole case. It is not necessary for the defendant to shew that the custom began since the time of legal memory. The evidence shews that for a considerable time the custom could not have been exercised; the burden of proof is thrown back on the plaintiff, and the presumption of immemorial user is destroyed.

The Act of 11 Geo. 3, c. 31, "For the encouragement of the white herring fishery," gave fishermen a right to spread their nets on any waste or uncultivated land within 100 yards of the sea.

The spreading of nets in this case may have begun under

(1) (1878) 4 C. P. D. 438. (2) [1896] 2 Ch. 1, 12.

FARWELL J. 1904 MERCER v. DENNE.

that Act, and that destroys the inference which the Court is asked to draw that it arose from immemorial custom.

The custom claimed amounts to exclusive occupation of the beach, and that is bad: *Truro Corporation* v. *Rowe*. (1) A custom to spread nets upon a certain close and all accretions is unreasonable.

June 25. FARWELL J. now delivered the following considered judgment:—The plaintiffs claim a declaration that they and all other the inhabitants of Walmer carrying on the trade or business of fishermen are entitled as of right at all times necessary or proper for the purposes of their trade or business to spread and dry their nets on a piece of shingle or beach lying just above high-water mark between Walmer Place and Walmer Castle, and an injunction restraining the defendant from building on the premises so as to interfere with their right. The piece of land in question in this action is about eleven acres in extent, and is of little (if any) value except to the fishermen for drying their nets or to the defendant for building purposes—objects which are unfortunately inconsistent with one another. During the whole of living memory, extending over upwards of seventy years in the case of the plaintiffs' witnesses (who were a body of honest and straightforward seafaring men, whose evidence appeared to me to be deserving of entire credit) and by reputation for many years before their birth, the fishermen of Walmer (by which I mean the inhabitants of the parish of Walmer who are fishermen) have used this piece of ground for the purposes of drying their nets. The practice has varied somewhat during the last seventy years. There are three fisheries now practised at Walmer—the mackerel, the herring, and the sprat fisheries. The mackerel season is from May to July and in September and October, the herring fishery from October to Christmas, and the sprat fishery from November to March. Down to some thirty or thirty-five years ago herring nets and mackerel nets were cutched or tanned at the commencement of and in preparation for the fishery season, and were then spread out to

(1) [1901] 2 K. B. 870; [1902] 2 K. B. 709.

dry on the piece of ground in question, and at the end of the season the boats were brought up close to this piece of ground and the nets were taken directly to it and spread out on it or, if the weather did not permit of that, the nets were landed nearer the town and were then brought in carts to this piece of ground and spread out to dry before being put away for the winter, and this practice still remains with regard to the mackerel nets. Down to the same period the sprat nets were not spread on this piece of ground at all. About thirty or thirty-five years ago the practice of oiling the herring nets instead of cutching them and of oiling the sprat nets came into use, and these nets were also spread on the same piece of ground to dry. The time required for drying after oiling is longer than was required for the earlier process, and sprat nets are now put on the land at a period during which no nets used to be put there so far as living memory goes. The fishermen have occasionally in former years dried their nets in different places along the beach, but this piece of ground in question is that which has always been used and to the extent at times of covering its whole area, and has been known to the fishermen and their forefathers and spoken of amongst them as their own ground. On these facts the plaintiffs claim to have established the existence of a custom for all inhabitants of Walmer being fishermen to dry their nets on this piece of ground at such periods as may from time to time be necessary for the due prosecution of their trade as fishermen according to the varying exigencies of the fishing industry and the requirements of improved nets. The defendant objects (1.) that there is no reported case in which a custom for the fishermen of a parish to dry their nets on a particular piece of land has ever been decided, and that such a custom ought not now to be held to be good; and (2.) that a custom for any variation from the ancient times of user or ancient kinds of nets is bad for uncertainty.

I cannot find that the validity of a custom for the fishermen of a parish or town to dry their nets in a particular close has ever been expressly decided, but this is probably due to the fact that such validity has never been questioned.

FARWELL J. 1904 MERCER v. DENNE.

Although the case in the Year Book, 8 Edw. 4, p. 18, which is translated by Holroyd J. in *Blundell* v. *Catterall* (1), is referred to as an authority on the point in several subsequent books, I think that the point was assumed, not decided, therein; and this is probably due to the fact stated by Professor Maitland in his admirable preface to the Year Books now in course of publication by the Selden Society, vol. xvii. p. xiv., that the reports in the Year Books were "instructions for pleaders rather than the authoritative fixation of points of substantive law." The general law was assumed, the point of interest to certain "sad and grave men" who reported the cases was the form of pleading. Thus Hale (De Portibus Maris, published by Mr. Hargrave in 1787) says, at p. 86, "Look at the book of 8 Edw. 4, p. 18, for the custom of Kent, for fishermen to dry their nets upon the land, though it be the soil of private men," referring to the Year Book as stating the existence of a well-known custom. In the case of *Tanistry* (2) it is stated by counsel as an instance of a well-known custom, "so to turn the plough on the headland of another in favour of husbandry, and to dry nets on the land of another in favour of fishing and navigation." This passage is set out verbatim in Rolle's Abr. Custom, F. 2, as a correct statement of the law. In *Fitch* v. *Rawling* (3) Buller J., in 1795, says: "With respect to the case in Bro. Abr. Custom, pl. 46, there the custom was holden to be bad, not because it was for the fishermen of Kent to dry their nets on the plaintiff's land (which the case in Cro. Car. shews to be good), but either because the digging in the soil, in order to pitch stakes to hang the nets upon was unnecessary, or it tended to the destruction of the inheritance." I am unable to verify the reference, for *Baker* v. *Brereman* (4) appears to state only that inhabitants cannot prescribe for a profit à prendre in alieno solo "for fishermen to dry their nets for the public benefit or for easement," and I can find no other case in Cro. Car. on the subject. In *Pain* v. *Patrick* (5) the Court, in holding that the custom in that case was well alleged,

(1) 5 B. & Al. 295; 24 R. R. 353.
(2) Davies Rep. 78, 88.
(3) 2 H. Bl. 393, 398; 3 R. R. 425.
(4) Cro. Car. 418.
(5) 3 Mod. 289, 294.

said: "This may be as well alledged as a custom to turn a plow upon another man's land, or for a fisherman to mend his nets there." In Bacon's Abr. Custom, p. 566 (the first edition of which was published in 1736), this custom is given as good, "so a custom to dry nets upon the land of another; for this is in favour of fishing and navigation." I have failed to find the marginal reference which he gives as his authority—5 Co. 84—and which is also given by Tindal C.J. in *Lockwood* v. *Wood* (1); but the Lord Chief Justice treats the custom as of known validity in 1844. He says: "A custom which has existed from time immemorial without interruption within a certain place, and which is certain and reasonable in itself, obtains the force of a law, and is, in effect, the common law within that place to which it extends, though contrary to the general law of the realm . . . . Thus a custom for all fishermen within a certain district to dry their nets upon the land of another might well be a good custom." In *Tyson* v. *Smith* (2) the same Lord Chief Justice says: "Nor is a custom unreasonable because it is prejudicial to the interests of a private man, if it be for the benefit of the commonwealth, as the custom to turn the plough upon the headland of another, in favour of husbandry, or to dry nets on the land of another, in favour of fishing and for the benefit of navigation." In *Race* v. *Ward* (3) Lord Campbell, in speaking of the right of the inhabitants of a district by custom to go on the soil of another and take water, says that in 15 Edw. 4, 29 A, Catesby J. treats it as good, and likens it to a custom for all the fishermen, inhabitants in a particular vill, to dry their nets on a particular close.

Although, therefore, I have failed to find any express decision, there are so many opinions in favour of the validity of the custom expressed by so many eminent lawyers, that it would be impossible for me to disregard them, and on principle the custom is, in my opinion, good. A custom must be certain, reasonable in itself, commencing from time immemorial,

(1) 6 Q. B. 50, 64; 66 R. R. 278, 287.

(2) 9 Ad. & E. 406, 421; 48 R. R. 539.

(3) 4 E. & B. 702, 710.

FARWELL J. 1904 MERCER v. DENNE.

and continued without interruption. It is not unreasonable because it is prejudicial to the interests of a private individual if it is for the benefit of the commonwealth, because such benefit renders its lawful commencement reasonably probable. As Lord Cranworth says in *Marquis of Salisbury* v. *Gladstone* (1): "In truth, I believe, that when it is said that a custom is void because it is unreasonable, nothing more is meant than that the unreasonable character of the alleged custom conclusively proves that the usage, even though it may have existed immemorially, must have resulted from accident or indulgence, and not from any right conferred in ancient times on the party setting up the custom." This has considerable bearing on Mr. Eve's argument that the custom alleged in this action is uncertain; his contention is, in effect, that the custom must be to dry nets, not for the purposes of fishing generally, but at particular times and for particular fish. But this is to discard the kernel for the shell, and might result in making an arrangement that was in its inception reasonable, because of public benefit, become actually injurious to public interests. If the fishermen of Walmer may dry their nets only on the condition of fishing for such fish and at such times and with such nets as the fishermen in the reign of Richard I. used to do, all improvements and progress are debarred. But there is no authority or principle for any such contention. A custom is not uncertain because it is not invariable in every part. Thus, a custom to pay a year's improved value for a fine on a copyhold is good, though the value is a thing uncertain, for the value may be at any time ascertained: Steph. Comm., 14th ed. vol. i. p. 28. Again, the very statement that a custom may be well laid in the inhabitants of a town shews that the number of persons entitled to enjoy it will vary from time to time. In *Abbot* v. *Weekly* (2) a custom for all the inhabitants of a vill to dance on the plaintiff's close at all times of the year was held good; and this was followed in *Hall* v. *Nottingham* (3), where it was held that a custom for the inhabitants of a parish to enter

(1) (1861) 9 H. L. C. 692, 701. (2) (1665) 1 Lev. 176.
(3) 1 Ex. D. 1.

upon certain land of the plaintiff and erect a maypole thereon and dance round it and otherwise enjoy on the land any lawful and innocent recreation at any time of the year was held good.

In *Dyce* v. *Hay* (1) Lord St. Leonards says that "there is no rule in the law of Scotland which prevents modern inventions and new operations from being governed by old and settled legal principles. Thus, when the art of bleaching came into use, there was nothing in its novelty which should exclude it from the benefit of a servitude or easement, if such servitude or easement on other legal grounds was maintainable. The category of servitudes and easements must alter and expand with the changes that take place in the circumstances of mankind. The law of this country, as well as the law of Scotland, frequently moulds its practical operation without doing any violence to its original principles." Mr. Upjohn, in his ingenious reply, pointed out that this is fully borne out by the case of *Fitch* v. *Rawling* (2), where a custom for all the inhabitants of a parish to play at all kinds of lawful games, sports, and pastimes in the close of A. at all seasonable times of the year was held to justify the defendants in playing cricket there, although it is reasonably certain that cricket was unknown until long after the time of Richard I. (see "Strutt's Pastimes," ed. 1801, pp. 83-4), and that, if it came within the description of any of the newly imagined games contained in the Act of 17 Edw. 4, c. 3, it was made illegal by that Act, which was not repealed until the reign of Henry VIII. It is clear from that Act, and the Act of 12 Ric. 2, c. 6, that the number and nature of the games that were lawful varied from time to time, but it has never yet been suggested that such variations rendered the custom to play all lawful games void for uncertainty, and I can see no reason for holding that a custom to dry nets at all times seasonable for fishing is bad, although the periods and numbers and sorts of nets may vary.

During the trial the defendant desired to set up a plea that the beach in question, or a great part of it, had come into existence of late years, and to contend that it followed therefrom that no custom to dry nets thereon could have existed for the

(1) 1 Macq. 312. (2) 2 H. Bl. 393; 3 R. R. 425.

FARWELL J. 1904 MERCER v. DENNE.

requisite period. I accordingly allowed the trial to stand over, and gave both parties liberty to amend and to adduce further evidence. With regard to the plaintiffs' amendments in paragraph 3 of the statement of claim, I am bound by and follow *Shuttleworth* v. *Le Fleming* (1) and *Mounsey* v. *Ismay*. (2)

The defendant has amended by adding these allegations: "In and prior to the year 1799 and for many years subsequent thereto the beach ground was below high-water mark and subject to the flux and reflux of the tide, and until comparatively recent years was wholly unsuitable and, in fact, incapable of being used for the purposes alleged by the plaintiffs, and was formed by gradual accretion and the receding of the sea, and is now above high-water mark, and does not now form any part of the seashore or foreshore," and I have had a considerable amount of evidence relating thereto. I have rejected a number of plans as inadmissible, but as I was told that the case was likely to go to the Court of Appeal, I have taken evidence concerning them as though I had not excluded them, and I can only say that if I had not rejected them as inadmissible I should have discarded them as worthless. [His Lordship discussed the value of the evidence of some of the witnesses, and continued:—]

I find the facts to be as follows: The beach in question is a ridge, which from time immemorial has acted as a barrier against the sea for the protection of the land behind it. That land is on so low a level that but for the beach it must have been submerged, but it has never been so during historic times. I accept the opinion of Mr. Whittaker (one of the plaintiffs' witnesses) on this point, and it is corroborated by the nature of the subsoil, as proved by the contractor, who excavated part of it to a depth of five feet in making sewers, and by the discovery of a Romano-British burying-place in the grounds of Walmer Lodge. I find, also, that the coast in this neighbourhood has for the last century at any rate been subject to fluctuations by way of increase by accretion and of decrease by demolition owing to the action of the winds. When the prevailing wind blows on shore for a cycle of years,

(1) 19 C. B. (N.S.) 687. (2) 3 H. & C. 486.

the process of accretion goes on, but the prevailing winds alternate over long series of years, and consequently the actual line of high water varies according to the duration of such prevailing winds and their aggregate action. The actual ascertainment with certainty of high-water mark at a given date is a matter of difficulty and time, and cannot be effected by a mere survey. No ancient plans or maps can be relied on as shewing high-water mark, and no charts prior to 1795. The two charts which have been put in are Spencer's of 1795 and Bullock's of 1844, both of which are trustworthy. But with regard to Spencer's chart there is a difficulty in ascertaining which of the three lines shewn on the coast is intended to be the high-water mark and which the low-water mark. I accept Commander Jarrard's (one of the plaintiffs' witnesses) opinion that the two dotted lines represent the high and low water mark, partly on his authority, and partly because if the thick black line is taken, as the defendant's witnesses contend, the area between high and low water would be 590 feet—an area much too large to be appropriate to anything but the beach generally; and one of the two dotted lines would be unaccounted for. Adopting these two charts, I find that in 1795 the high-water mark was approximately in the same place as at present, that in 1844 the sea had advanced fifty or sixty yards, and that at the present time this amount of beach has been regained.

The defendant has therefore proved that in 1844 a considerable portion of the beach in question (say, three acres) was below high-water mark and was, therefore, inappropriate for drying nets, and he argues that he has thereby shewn that to the extent of that portion the custom must have commenced since the time of Richard I. A defendant may no doubt defeat a custom by shewing that it could not have existed in the time of Richard I., but he must demonstrate its impossibility, and the onus is on him to do so if the existence of the custom has been proved for a long period; this was done, for instance, in *Simpson* v. *Wells* (1), where the claim of a custom to set up stalls at the Statute Sessions for the hiring of servants was

(1) (1872) L. R. 7 Q. B. 214.

FARWELL J. 1904 MERCER v. DENNE.

defeated by shewing that such sessions were introduced by the Statutes of Labourers, the first of which was in the reign of Edward III. But no such impossibility is shewn in the present case. If the beach was of its present extent in 1795, why am I bound to infer that it cannot have been the same in 1186 from the mere fact that between 1795 and 1844 the extent diminished and has since again increased? The mere non-user during the period that the sea flowed over the spot is immaterial, for it was no interruption of the right, but only of the possession, and "an interruption of the possession only, for ten or twenty years, will not destroy the custom": 1 Bl. Comm. 77; Co. Litt. 114 b. Not only ought the Courts to be slow to draw an inference of fact which would defeat a right that has been exercised during so long a period as the present unless such inference is irresistible, but it ought to presume everything that is reasonably possible to presume in favour of such a right: see *Goodman* v. *Saltash Corporation*. (1) I see no reason why I should not presume that this beach was in substantially the same state in 1186 as now. The inland limit is fixed by geological considerations and the Romano-British burying-place; in the reign of Henry VIII. the castle of Walmer was built as a defence for the coast; it must have been near but safely above high-water limit; and I see nothing to compel me to infer any substantial difference in this piece of beach in 1186.

It was next argued that the variations in the beach shewn by the two maps of 1795 and 1844 and the present state of things render it impossible to define with sufficient certainty the land affected by the custom, and therefore render the custom bad for uncertainty. But it cannot be necessary to define the limits of land affected by a custom more clearly than those of land comprised in a grant for the same purpose. I think that the same principle must apply, the difference between custom and prescription being only that the right to the former must be claimed by or in respect of a locality, and to the latter by a person or corporation, but the rules affecting the subject-matter are in each case the same, and I have no doubt that

(1) (1882) 7 App. Cas. 633.

a grant of land which in fact adjoins the sea would be well defined by reference to high-water mark as one of its boundaries. It is said that it is uncertain whether this means high water as it was in 1186 or high water now; but I have evidence of usage and that the nets have been spread down to high-water mark for the time being. This is quite sufficient. Thus in *Bennington* v. *Taylor* (1) dean and chapter prescribed for a double stall, "et pro fundo sive solo prope et juxta eandem stallam"; and the third objection taken was that it was uncertain and is void; but the objection failed, "for that shall be ascertained by the common usage of the fair." The argument of the defendant on this point savoured rather of the Agri Limitati of the Romans—Digest, 41. 1. 16—than of anything known to the English law.

Then it is said that it is unreasonable, because the sea may recede for a mile or more, as at Sandwich, and it is impossible to suppose that any such extent of ground could ever have been intended to be appropriated to such a custom. It is enough for me to say that as the event has not happened for upwards of 700 years I cannot see the unreasonableness. The period for ascertaining whether a custom is reasonable or not is its inception. The point is dealt with by Tindal C.J. in *Tyson* v. *Smith* (2): "But it is said the number of these victuallers may be so large, and the space occupied by each so great, as that the whole portion of the common set out for the fair may be taken by them in exclusion of the rest. . . . But it is obvious that this is not an argument against the custom being reasonable in its original commencement, or against the prescription for the fair being a reasonable prescription: it is an objection only as to the mode of exercising the right so claimed, whether under the custom or the prescription." I say in this case, as Lord Cranworth said in *Marquis of Salisbury* v. *Gladstone* (3), "I find it impossible to say that such a custom as that here alleged might not have resulted from an agreement between the lord and his tenants before the time of living memory." But the plaintiffs have raised this further and

(1) (1700) 2 Lutw. 1517. (2) 9 Ad. & E. 406, 423; 48 R. R. 539.
(3) 9 H. L. C. 692, 702.

FARWELL J. 1904 MERCER v. DENNE.

interesting point, for they say that even assuming that these three acres did not exist in the time of Richard I., but have since been added by accretion, this would not affect their right, inasmuch as both sides must agree that these three acres have arisen by small and imperceptible degrees (and they must so agree in order to exclude a claim by the Crown), these added acres are an accretion to the defendant's land and became subject to the same custom to which the land to which they were added was subject. There is no authority exactly in point, but I have come to the conclusion on principle and on the authority of an analogous case that this contention is well founded. Blackstone, Comm. vol. ii. p. 262, states the law to be that, "if the gain be by little and little, by small and imperceptible degrees, it shall go to the owner of the land adjoining. For de minimis non curat lex: and, besides, these owners being often losers by the breaking in of the sea, or at charges to keep it out, this possible gain is therefore a reciprocal consideration for such possible charge or loss." In *Attorney-General* v. *Chambers* (1) Lord Chelmsford quotes this passage, and proceeds: "I am not quite satisfied that the principle de minimis non curat lex is the correct explanation of the rule on this subject; because, although the additions may be small and insignificant in their progress, yet, after a lapse of time, by little and little, a very large increase may have taken place which it would not be beneath the law to notice, and of which the party who has the right to it can clearly shew that it formerly belonged to him, he ought not to be deprived. I am rather disposed to adopt the reason assigned for the rule by Alderson B. in the case of the *Hull and Selby Ry. Co.* (2), viz., 'That which cannot be perceived in its progress is taken to be as if it never had existed at all.' And as Lord Abinger said in the same case, 'The principle' as to gradual accretion 'is founded on the necessity which exists for some such rule of law for the permanent protection and adjustment of property.' It must always be borne in mind that the owner of lands does not derive benefit alone, but may suffer loss from the operation of

(1) (1859) 4 De G. & J. 55, 68.
(2) (1839) 5 M. & W. 327; 52 R. R. 733.

this rule; for if the sea gradually steals upon the land, he loses so much of his property, which is thus silently transferred by the law to the proprietor of the seashore." This reasoning applies with equal force to the persons entitled to exercise rights over a piece of land adjoining the sea. If it is washed away, their rights are gone. If it increases, their rights ought to extend over the increased area. It is said that it would be absurd to apply this to a case where the sea has receded for a mile or more; but that is not this case. It is sufficient for me to say (following Alderson B.) that this accretion is to be treated as though it had occurred in 1186. If there was now a mile or more of such accretion, it would hardly be possible to find evidence of actual user over more than the fringe near the sea, and the extent of the custom could be limited by such user; or, even if any such user could be shewn, the landowner's right of free enjoyment would only be limited by a reasonable exercise of customary rights, and it would probably be held unreasonable to insist on drying nets over a large tract of land. Further, I have the authority of the analogous case of *Foster* v. *Wright*. (1) In that case the river Lune had gradually changed its bed. The plaintiff had a free fishery in the ancient river. The defendant owned lands which originally did not abut on the river, but had, by means of the alteration in the river bed, become the river bank. The question was whether the plaintiff's exclusive right of fishing extended over so much of the water as flowed over land which was identified as formerly part of the defendant's property, and it was held that it did. Lindley J. said (2): "I am wholly unable to see upon what principle a change in the course of a river, so gradual that it cannot be perceived until after the lapse of a long interval of time, can affect the rights of those entitled to use it, whether for fishing or any other purpose: nor is there any authority for holding them to be affected thereby." And Lord Coleridge C.J. held that the plaintiff was entitled to a several fishery, and said (3): "And such a fishery I think would follow the slow and gradual changes of a river, such as the changes of the Lune in this case."

(1) 4 C. P. D. 438. (2) 4 C. P. D. 448. (3) 4 C. P. D. 449.

FARWELL J.
1904
MERCER v. DENNE.

Further, the opinion of text-writers, dealing with the analogous cases of accretion to copyholds and wastes of manors, are to the same effect. Thus, Hall on the Sea Shore (2nd ed. p. 113; p. 789 of Mr. Stuart Moore's edition) concludes that the land which has accreted to the lord as freehold must be subject to the copyhold interest of the tenant of the land to which it has been added, or, if waste, to the local customs, common, &c., prescribed for by the tenants in respect of such waste. The late Mr. Phear (Rights of Water, p. 43, n.) conjectures that "the land which gradual accretion gives to adjoining lands assumes their character, i.e., becomes freehold or copyhold, and in the latter case waste or tenanted accordingly." I hold, therefore, that the land which has been added by accretion takes the character of the land to which it has been added, and is subject to the same customs as affected such land. The result is that the plaintiffs succeed, and I grant the injunction as asked. The defendant must pay the costs of the action.

Solicitors: *Hare & Co., for Hardman, Deal; Mowll & Mowll, for Mowll & Mowll, Dover.*

J. R. B.

C. A.
1904
June 30.

In re FARNHAM'S SETTLEMENT.
LAW UNION AND CROWN INSURANCE COMPANY *v.* HARTOPP.

[1903 F. 1174.]

Settled Land — Repairs — Sanitary Works, Cost of — Tenant for Life and Remainderman — Capital or Income — Public Health (London) Act, 1891 (54 & 55 *Vict. c.* 76), *ss.* 4, 121, 141.

Where a settled trust fund was invested under the powers of the settlement in the purchase of freehold houses in the City and the trustees were required by the corporation under the Public Health (London) Act, 1891, to do certain repairs on the property, and the equitable tenant for life, having by arrangement with the trustees done the repairs, applied to the Court for a charge on the corpus for the cost of the repairs, but ultimately waived his claim except as to so much of the expenditure as should be found to have been incurred in respect of repairs in the nature of permanent improvements :—

Held, that he was entitled by subrogation to the rights of the trustees to a charge on the corpus for that amount.

Decision of Kekewich J. reversed.

Semble, where the trustees of a settled estate apply to the Court to be indemnified out of the estate for the cost of repairs done by them on the property in answer to a demand by a sanitary authority, it is competent to the Court to determine according to the circumstances of the case how the cost shall be borne as between tenant for life and remainderman.

Appeal from a decision of Kekewich J.

Under the trusts of a settlement dated November 6, 1882, made on the marriage of Mr. and Mrs. Farnham, the husband became beneficially entitled, in the events which happened, to the income of a trust fund, part of which was invested in accordance with the powers of the settlement in two freehold houses Nos. 40 and 41, Foster Lane, in the City of London, and a leasehold house No. 39, Foster Lane. After the death of the husband the fund was settled in trust for the wife for life, and after the death of the successor in trust for the children of the marriage.

The plaintiffs were assignees of the husband's and wife's life interests under the settlement.

In November, 1902, a notice under the Public Health (London) Act, 1891, addressed "To the owner or occupier of

C. A. 1904

FARNHAM'S SETTLEMENT, *In re.*

LAW UNION AND CROWN INSURANCE COMPANY *v.* HARTOPP.

Nos. 39, 40, 41, Foster Lane, E.C.," was served upon or came into the hands of the trustees of the settlement in respect of these premises. The notice, which was in Form A of the 3rd schedule to the Act, gave notice to the trustees that the corporation, as the sanitary authority for the City, being satisfied of the existence of a nuisance on the said premises, "to wit, defective drains, soil-pipes, water-closets, and rain-water and water pipes are not disconnected from direct communication with the drain, the said drains, soil-pipes, water-closets, rain and waste water-pipes, and premises being in such a state as to be a nuisance or injurious or dangerous to health," thereby required them within fourteen days from the service of the notice to abate the same, and to execute such works as might be necessary for that purpose.

By arrangement between the plaintiffs and the trustees the plaintiffs undertook to execute the necessary works without prejudice to the question who should ultimately become liable for the cost. The works were executed by the plaintiffs' order to the satisfaction of the City authorities, but they had not yet been paid for. The cost of the works with reference to the two freehold houses, to which alone this action relates, amounted to 255*l.* 19*s.* 10*d.* The works included relaying the whole of the drains, where necessary, and connecting same to pipe from the main sewer. It was stated in an affidavit sworn by the plaintiffs' surveyor, and not contradicted, that these works were in the nature of permanent improvements and in no way of the nature of ordinary repairs.

The plaintiffs took out a summons against the trustees and the remaindermen, asking that the cost of these works might be paid to the plaintiffs by the trustees out of capital moneys in their hands, subject to the trusts of the settlement. The summons was issued under the Settled Land Acts, 1882–1890; but, the trustees having no capital moneys in their hands, it was treated by Kekewich J. as a summons for a charge under the general jurisdiction of the Court. The application was based upon the principle of *In re Lever.* (1)

Kekewich J. refused the application, and distinguished *In re*

(1) [1897] 1 Ch. 32.

Lever (1) from the present case upon the ground that that was an application by the trustees to be indemnified, whereas this was an application by the tenant for life. He made no order upon the summons except that the plaintiffs should pay the costs of it; but this order would be without prejudice to any future application by the plaintiffs under the Settled Land Acts to be allowed this expenditure when the trustees should have any capital moneys in their hands.

The plaintiffs appealed, and asked for a declaration that the cost of the works ought to be borne by corpus and not income, and that the amount of the expenditure and the costs of all parties to the action might be raised by a charge on the settled property.

Badcock, K.C., and *E. S. Ford*, for the plaintiffs. The question in this case is how the expense of certain repairs required to be done on the settled property by the sanitary authority of the City under the Public Health (London) Act, 1891, is to be borne as between tenant for life and remainderman. Under the Act the trustee is the owner of the property, and if the trustee has no funds in his hands it is his duty to come to the Court and ask how the expense should be borne. The fact that the plaintiffs have done the works under an arrangement with the trustees without prejudice to the question how the expense shall be borne does not affect the rights of the parties. It does not matter who makes the application to the Court; the question is who has to pay. The Act under which this work was done throws the liability on the owner, and draws no distinction from the nature of the work: see ss. 4, 121, 141. The trustee is therefore entitled to be recouped out of corpus: *In re Lever*. (1)

[COZENS-HARDY L.J. Is not that case inconsistent with *In re Copland's Settlement*? (2)]

That was a case of leaseholds, and there was enough in that case to shew that the tenant for life was the person to be liable. *In re Barney* (3) is also in point.

(1) [1897] 1 Ch. 32. (2) [1900] 1 Ch. 326.
(3) [1894] 3 Ch. 562.

C. A. 1904

FARNHAM'S SETTLEMENT, *In re.* LAW UNION AND CROWN INSURANCE COMPANY *v.* HARTOPP.

[ROMER L.J. I gather that was a case in which the whole of the works were permanent improvements.]

So here admittedly the works are not ordinary repairs, but permanent improvements. It is so stated by the plaintiffs' surveyor, and not contradicted.

[COZENS-HARDY L.J. Kekewich J.'s judgment is consistent with *In re Tucker's Settled Estates.* (1)]

That was a decision under the Settled Land Act, and has no application to this case. This was a reconstruction of drains by reason of vis major in the shape of a demand by the sanitary authority; it is work which has been executed for the benefit of all concerned. It is really a case of salvage. If the work had not been done there would have been a hostile abatement order, or the work would have been done by the sanitary authority probably at a much greater expense, and the cost would have been recovered from the trustees. That has been avoided by the act of the plaintiffs. They are, therefore, entitled to stand in the shoes of the trustees and to have the money paid out of corpus: *In re Teissier's Settled Estates.* (2)

[ROMER L.J. I do not think that Stirling L.J. in *In re Lever* (3) meant to decide that in the case of works executed under a notice from a sanitary authority the Court had no discretion to apportion the expense between tenant for life and remainderman, but he came to the conclusion that the works executed in that case were not in the nature of ordinary repairs.]

Here the works are of a more important character than they were in that case.

Further, an equitable tenant for life is not liable for permissive waste; he cannot be made responsible for neglecting to repair, and the expense of the repairs cannot be thrown on the rents: *Powys* v. *Blagrave* (4); *In re Hotchkys* (5); *In re Freman.* (6)

[VAUGHAN WILLIAMS L.J. *In re Hotchkys* (5) seems to shew that the money must be taken from income or capital

(1) [1895] 2 Ch. 468.
(2) [1893] 1 Ch. 153, 161.
(3) [1897] 1 Ch. 32.
(4) (1854) 4 D. M. & G. 448.
(5) (1886) 32 Ch. D. 408, 418.
(6) [1898] 1 Ch. 28.

according as it is equitable between tenant for life and remainderman.]

P. O. Lawrence, K.C., and *Church*, for the remaindermen. This is a summons under the Settled Land Acts; but the plaintiffs have shifted their ground, and the notice of appeal asks for a different relief.

[ROMER L.J. The summons must be amended by asking for administration of the trusts of the settlement, and for a charge on the estate for the amount of the expenditure.]

It is said that the authorities preclude the Court from deciding whether this expenditure is equitable as between the tenant for life and the remainderman, and the appeal asks that the whole expenditure shall be capital expenditure. But this is not an application by the trustees. The position would be different if the trustees had come to the Court. The trustees are the owners, with a duty to protect the estate. Here the tenant for life has taken upon himself the position of owner, and has incurred this expense as a mere volunteer. This case ought to be decided upon the same principle as a case under the Settled Land Act.

Stamp, for the trustees of the settlement.

Badcock, K.C., in reply, in answer to a suggestion from the Court, consented to an inquiry being directed as to how much of the expenditure was incurred in respect of works in the nature of permanent improvements.

VAUGHAN WILLIAMS L.J. As this case has turned out, I need not go into the general question as to the position of an equitable tenant for life who is not in possession, or into any of those questions which were discussed in *In re Hotchkys* (1) and *In re Freman* (2), and I must not be understood as saying anything to the contrary of what has been established by those cases. But the first thing we have to ask ourselves here is, having regard to the particular circumstances of this case, Is this tenant for life entitled to stand in the shoes of the trustees? And we are of opinion, subject to one observation which I am going to make, that he is so entitled, and that the

(1) 32 Ch. D. 408, 418. (2) [1898] 1 Ch. 28.

C. A. 1904

FARNHAM'S SETTLEMENT, *In re.* LAW UNION AND CROWN INSURANCE COMPANY *v.* HARTOPP.

Vaughan Williams L.J.

real right which the tenant for life ought to be allowed to enforce in this case is the right of the trustees. But I will not leave out of consideration that he is tenant for life. Without absolutely deciding what may be the equity against this tenant for life upon an adjustment of the expenditure as between him and those entitled to the corpus, we are of opinion that at all events he is entitled to a charge in right of the trustees by subrogation for the expenses of permanent improvements; and as the appellants by their counsel have expressed their willingness to accept an immediate charge for that amount, we will direct an inquiry how much of this expenditure has been in the nature of expenditure for permanent improvements of which the corpus will have the benefit; and to that extent we think that the appellants as assignees of the tenant for life are entitled to a charge. As has been already intimated, that which we are doing now is not in exercise of any jurisdiction which is given to the Court under the Settled Land Acts, and accordingly the order will be so drawn up. The appellants, in my judgment, have succeeded in this appeal, as that which we are giving them is very different from the postponement with liberty to apply which Kekewich J. gave them. With regard to the costs, the appellants submitting to pay the costs of all parties in the first instance, those costs will be added to the charge.

ROMER L.J. I have come to the same conclusion. This is not a case where the tenant for life has made a voluntary payment on account of repairs; it is not a case where the tenant for life has made a payment by reason of some legal obligation which has been cast upon him; it is a case where repairs had to be executed by the owners of the property, who were the trustees, and where the tenant for life found the money which otherwise must have been found by the trustees under an arrangement between them. In my opinion, in the circumstances of this case, the arrangement came to this—that the tenant for life in advancing the money was to be treated very much as if the money had been expended by the trustees. In other words, the circumstances are such

as in my opinion justified the tenant for life in saying that he stood in the trustees' place so far as the trustees themselves, if they had expended the money, would have had a right to call upon the remainderman to allow the money so expended to be charged to corpus. That being so, it is clear to my mind that upon this application the Court has jurisdiction at any rate to decide that so far as these moneys were expended in permanent improvements the trustees would be entitled to charge them upon the corpus of the estate; and inasmuch as the appellants' case is that these moneys were all expended in permanent improvements, and they do not object to the limitation which has been suggested by my Lord, I think that to the extent which he has indicated this appeal succeeds.

In the circumstances of this case, I, like my Lord, do not think it proper to discuss the various cases which have been cited. I only desire to say this, that I hope that it is still open to this Court to consider whether, when trustees come before the Court in such a case as that which we have now to deal with, the Court has not entrusted to it a discretion within its jurisdiction as to how moneys which have been expended by the trustees should be allotted as between tenant for life and remainderman. It is a matter to a great extent of discretion—of course, judicial discretion. The Court is not bound by any hard and fast rule, but has a jurisdiction to inquire what was the nature of the repairs and how they were required, and generally into the circumstances of the case. I do not want to go beyond what I have said, but I trust it is still open to the Court to consider that question in any future case.

COZENS-HARDY L.J. I am of the same opinion. If the trustees had come to the Court after the expenditure had been incurred, but before it had been paid, and had brought the tenant for life and the infant remaindermen before the Court, and had asked the Court to give them relief in the shape of a declaration of charge, I cannot myself doubt that it would have been competent to the Court to give the trustees a charge; and, on the other hand, I think that the Court would not have been bound to say that the charge should only be given in

C. A. 1904

FARNHAM'S SETTLEMENT, *In re.* LAW UNION AND CROWN INSURANCE COMPANY *v.* HARTOPP.

Cozens-Hardy L.J.

one form, namely, a charge upon the capital for the amount expended by the trustees. I think that it would have been competent to the Court to say that the amount should be raised by a terminable charge, the effect of which would have been that the tenant for life would bear, not merely the interest, but a portion of the capital. I think that it would have been further open to the Court to investigate the nature of the expenditure, and to say what was really fair, just, and equitable as between the various beneficiaries in the mode of distributing the burden between them. Here we have a peculiar set of facts: a legal liability upon the trustees to incur the expenditure, an arrangement made by the tenant for life with the trustees—an arrangement to which no doubt the remaindermen were not privy, but an arrangement under which the tenant for life said, "Without prejudice to any question, I, the tenant for life, will find the money required." Therefore, it seems to me that this is a case in which the tenant for life is entitled to say, "I am subrogated to the rights of the trustees to the extent to which the Court may consider that as against the capital of the estate the charge ought to exist"; and when the summons is amended in the manner which has been proposed, I think that there will be no difficulty in declaring that the appellants are entitled to a charge of that nature. I understand that the appellants do not really object to the declaration in the form which has been suggested, giving them a charge, not for the total amount of expenditure, which I think would not be right, but for so much only as can be shewn to have been spent in permanent improvements. There must be an inquiry before the master to work out that result, and the charge will also extend to the costs here and below. The charge will be for the aggregate amount of the total costs and the apportioned part of the 255*l.* 19*s.* 10*d.*, and it will carry interest at 4 per cent.

Solicitors: *Robins, Hay, Waters & Hay; Church, Adams & Prior.*

H. B. H.

SMITH *v.* LAW GUARANTEE AND TRUST SOCIETY, LIMITED.

C. A. 1904 Aug. 9.

[1893 S. 4734.]

Company—Debenture—Deficient Security—Principal or Interest—Appropriation of Payments—Income Tax.

A debenture trust deed executed by a company provided that the trustees should appropriate the proceeds of the realization of the securities in the first place towards payment of all arrears of interest on the debentures, and, secondly, towards payment of the principal. The company made default, and an action was brought on behalf of the debenture-holders to enforce their security. The judgment in the action ordered that the trusts of the deed should be carried into execution, and directed that the usual accounts and inquiries should be taken and made. The securities were gradually realized, and orders were from time to time made under which certain sums were paid to the debenture-holders on account of interest, after deducting income tax. When the order on further consideration was made there was evidence that the securities would prove insufficient, and that order directed that the plaintiffs' taxed costs as between solicitor and client should be paid by the trustees out of the moneys in their hands. The subsequent orders for payment to the debenture-holders directed that the payments should be made on account generally of what was due for principal and interest. The securities having been practically all realized, the trustees had in their hands a sum of money which they proposed to pay to the debenture-holders. It was admitted that if the whole of the payments to the debenture-holders were attributed to principal they would be insufficient to discharge the full amount due. The Commissioners of Inland Revenue claimed that all the payments made on account generally ought to be attributed to interest in the first place, and that income tax should be deducted from them. Upon a summons taken out by the trustees of the deed to determine this question :—

Held, upon the construction of the orders which directed payments on account generally, and having regard to the circumstances of the case, that the Court when making those orders had purposely left open for future determination the question how the payments were to be ultimately appropriated as between principal and interest, and that, it being now clearly for the benefit of the debenture-holders that those payments should be appropriated to principal, they ought to be so appropriated, without putting the debenture-holders to an election how the appropriation should be made, and consequently that income tax ought not to be deducted.

But the order was made without prejudice to the question whether the

C. A.
1904
SMITH
v.
LAW GUARANTEE AND TRUST SOCIETY, LIMITED.

payments, or any part or parts thereof, ought, in the hands of the persons to whom payments had been made, to be treated as principal or interest.

Decision of Byrne J., [1904] 1 Ch. 500, affirmed with a slight variation.

APPEAL by the Commissioners of Inland Revenue from the decision of Byrne J. (1)

The action was brought on behalf of the holders of the debentures series "C," issued by a company to enforce their security. The security proved insufficient. The trustees of the debenture trust deed having moneys in their hands which they proposed to pay to the debenture-holders, the Commissioners of Inland Revenue made a claim that certain payments, which had already, under orders in the action, been made to the debenture-holders on account generally of principal and interest, should be attributed to interest in the first place, and that income tax should be deducted. To determine this question a summons was taken out by the defendants, who were the trustees of the deed.

The facts are very fully stated in the former report. But, having regard to the grounds of the decision of the Court of Appeal, it is thought desirable to state more fully the terms of the judgment in the action and of the order on further consideration.

The judgment, dated December 8, 1895, after a declaration that the debentures of the series "C" constituted a first charge upon all property and effects comprised in the trust deed, and that the trusts of the deed ought to be performed and carried into execution, ordered that the following accounts and inquiries should be taken and made, namely, (1.) an account of what was due for principal and interest to the plaintiff and all other holders of the "C" series of debentures; (2.) an inquiry of what the property and effects then subject to the trusts of the trust deed consisted; (3.) an account of the property and effects come or which might come to the hands of or be received by the defendants, the Law Guarantee Society, or by any other person or persons by the order or for the use of those defendants, as trustees of the deed of trust, distinguishing in such account between capital and income.

(1) [1904] 1 Ch. 500.

And the further consideration of the action was adjourned; and any of the parties were to be at liberty to apply as they might be advised.

By the order on further consideration, dated July 2, 1895, it was ordered that the costs of the plaintiffs and of the defendants, the Law Guarantee Society, should be taxed as between solicitor and client, and that the Law Guarantee Society should be at liberty to pay and retain the said costs when taxed out of any moneys in their hands as such trustees; and it was ordered that, in lieu of the inquiry No. 3 directed by the judgment, the Law Guarantee Society should pass their accounts annually as on March 31, 1895, and on the same day in each succeeding year, of all moneys from time to time received by them, or by any person or persons by the order or for the use of the said defendants, as trustees of the trust deed. And they were to be at liberty from time to time to apply as to the distribution between the debenture-holders in the certificate of the chief clerk named, or any person claiming through or under them, of any moneys for the time being in their hands as trustees of the trust deed. And the parties were to be at liberty to apply as to any of the said mortgage securities and otherwise as they might be advised.

Among the evidence upon which this order was made was an affidavit by the plaintiffs' solicitor sworn on July 1, 1895, in which he said that from his knowledge of the securities held by the Law Guarantee Society as trustees for the debenture-holders, and also from the expert reports which had been made both in America and England as to the value of those securities, there was absolutely no chance of the company's proving solvent even if the debenture-holders were allowed to come upon the general assets of the company to make up any deficiency under the trust deed. In his opinion, therefore, the debenture-holders could not realize 20*s.* in the pound upon their principal and interest.

Byrne J. held that the provision in the trust deed for payment of interest in the first place was inserted for the benefit of the debenture-holders, and could be waived by them in the absence of opposition by the debtors; that, as between

C. A. 1904 SMITH v. LAW GUARANTEE AND TRUST SOCIETY, LIMITED.

themselves and the trustees, the debenture-holders must elect whether they would take the money as principal or interest, without prejudice to the question whether in their hands it would afterwards be treated differently; and that income tax would be payable only upon so much of the fund as the debenture-holders should elect to take as interest.

The precise terms of the order as drawn up are stated [1904] 1 Ch. at p. 511.

The Commissioners appealed.

Sir E. Carson, S.-G., and *Vaughan Hawkins*, for the appellants, repeated the arguments which had been adduced in the Court below, referring to 16 & 17 Vict. c. 34, s. 2, Sched. D, paragraph 3, and to the Customs and Inland Revenue Act, 1888 (51 & 52 Vict. c. 8), s. 24, sub-s. 3, and citing *London County Council* v. *Attorney-General* (1) and *Bower* v. *Marris*. (2)

Levett, K.C., and *A'B. Terrell*, for the plaintiffs.

Ward Coldridge, for a debenture-holder.

Whitten, another debenture-holder, in person.

E. Beaumont, for the defendants.

Vaughan Hawkins, in reply.

VAUGHAN WILLIAMS L.J. This case is a somewhat difficult one to deal with, because it is not easy to ascertain with certainty what was the view of the Court when it made the several orders which have been referred to in argument. But the real question which we have to determine must be determined principally in reference to the two orders of June 15, 1896, and July 21, 1897. The question is whether we ought to treat the payments made under those two orders as made on the basis of clause 11 of the trust deed, which is indorsed on the debentures, or whether we ought to treat those orders as made outside the provisions of clause 11. [His Lordship read clause 11 as stated in [1904] 1 Ch. at pp. 500, 501, and continued :—]

It is not, I think, disputed by the respondents that if,

(1) [1901] A. C. 26, 39, 43. (2) (1841) Cr. & Ph. 351.

according to the true construction of the orders to which I have referred, they must be taken as directing payments to be made on the basis of the trust contained in clause 11, this appeal ought to succeed. The whole question is whether we ought to treat those orders as made upon that basis. [His Lordship read the orders of June 15, 1896, and July 21, 1897, which are stated in the former report, and continued:—]

What then was the state of things anterior to the making of those orders? In the first place, there was the judgment in the action. [His Lordship read it.] So up to that time the judgment directed an account to be taken of property come to the hands of the trustees, distinguishing between capital and income. Then follows the order on further consideration, dated July 2, 1895; and when we look at that order we find in it, first, a direction as to the taxation and payment of the plaintiffs' costs, which, as my brethren tell me, according to the practice of the Chancery Division (I know nothing about it), would only have been made if it had been shewn to the Court that the company, the mortgagor, was insolvent, and that the securities were insufficient to meet the principal of the debt. Then we find that the direction to take the account distinguishing between capital and income has dropped out of the order on further consideration. It seems to me impossible to doubt that that direction dropped out because, having regard to the insolvency of the company and to the fact that there was not enough to pay the principal of the debt, it was unnecessary and would be a useless expense to have a further account taken which should distinguish between capital and income.

That being so, what further provision was made? The further provision was that the trustees should pass their accounts annually, and that they should be at liberty from time to time to apply as to the distribution between the debenture-holders in the certificate of the chief clerk named, and any person claiming under or through them, of any moneys for the time being in their hands as trustees of the trust deed, and there was a general liberty to apply.

It would not, I suppose, be denied that, if it was present to

C. A. 1904 SMITH v. LAW GUARANTEE AND TRUST SOCIETY, LIMITED. Vaughan Williams L.J.

the mind of the judge that it was perfectly hopeless to expect the payment of the principal in full, it would have been open to him to direct that the moneys received by the trustees should be paid and distributed on account of principal. To that extent clause 11 of the trust deed would cease to apply. As I read it, that clause is upon the face of it intended to be applicable only as long as there is solvency—that is, as long as there is enough to pay the principal and something beyond. The affidavits which brought the insolvency, or alleged insolvency, to the notice of the Court have been read to us. The figures do not strike one as shewing that the deficiency would amount to anything approximating to a total loss. In all probability, at the moment when the orders of June, 1896, and July, 1897, were made, all that could be said was that it was extremely probable that there would be a deficiency in the securities such as to make it impossible to pay the principal in full, and that under these circumstances it would be better, instead of making any definite appropriation as between principal and interest, to leave the moneys unappropriated. It would obviously in that state of circumstances have been against the interest of the debenture-holders, and indeed of every one concerned, to order that the moneys received should be distributed as and for interest. On the other hand, having regard to the affidavits, it might not be desirable immediately to direct payment on account of principal.

In this state of things, these orders of June 15, 1896, and July 21, 1897, were made. The case is really not like one in which there has been simply a payment on account generally by a mortgagor to a mortgagee, without any appropriation, which would no doubt fall within *Bower* v. *Marris*. (1) In this case it may be (I do not for the moment say it is so) that the Court deliberately made the orders in such a way that the payments should not be immediately appropriated. If the payments had been made simply generally on account, it may well be that *Bower* v. *Marris* (1) would apply.

In my view, taking all the circumstances into consideration, I think we ought to read these orders as made deliberately, not

(1) Cr. & Ph. 351.

appropriating the money, but withholding any appropriation until a further application should be made to the Court, and giving liberty to apply so that the moneys should afterwards be appropriated.

I think this view accords with what Byrne J. has said in his judgment; and under these circumstances I have nothing further to say, except to refer to what Byrne J. said in dealing with the question what the interest of the debenture-holders was. Now that it has been absolutely ascertained that there cannot be sufficient to pay the principal in full, it is unnecessary to ask the debenture-holders whether they would prefer that these moneys should be appropriated to interest or to capital, because obviously it is the interest of every one that the payments should be now attributed to capital. That being so, I think that though the judgment of Byrne J. ought to be affirmed, there ought to be a slight variation in the terms of his order, which is stated [1904] 1 Ch. at p. 511. The words "at the option of the holders of the said debentures as between themselves and the applicants" (in lines 3, 4, and 5 of the order) will be omitted, and also the following words—"or of interest, and no income tax is payable in respect of so much thereof as is attributed to capital."

There will simply be a declaration that all the payments are to be attributed to capital. The words "but this declaration is without prejudice to the question whether or not such payments or any part or parts thereof ought, in the hands of the persons to whom payments have been made, to be treated as capital or interest," will remain. Then I think the next passage, beginning "And in case," down to "in respect of interest as aforesaid," may be omitted, because we have got rid of the option. The remainder of the order will stand as it deals with a future matter.

Subject to those variations in the order, I think the appeal ought to be dismissed.

ROMER L.J. I also think that in substance the conclusion at which Byrne J. arrived was right. The question which we have to decide does not, as it seems to me, involve any general

C. A. 1904 SMITH v. LAW GUARANTEE AND TRUST SOCIETY, LIMITED. Romer L.J.

principle; it turns merely upon the true construction of the orders of June 15, 1896, and July 21, 1897. If those orders in effect definitely and finally directed the appropriation of some part of the moneys dealt with by them in or towards the payment of interest on the debentures, then of course income tax became payable in respect of the moneys which were to be so paid as interest, and, after the order was made and payment had been received on the footing of it, the debenture-holders could not be heard to say that they wished to receive the moneys so paid on account of interest as if they had been paid on account of principal. But the question is, Did the orders have such a final and definite effect? I cannot say that the question is free from difficulty; but on the whole I have come to the conclusion that the orders had not the effect attributed to them by the Crown. It must be borne in mind that before those orders were made the Court had heard the action on further consideration. By the judgment in the action the usual account was directed of what was due for principal and interest on the debentures, and an account was directed of the property forming the security for the debentures received by the trustees, and they were ordered, no doubt for some purpose, in rendering their accounts to distinguish between capital and income. But, when the action came on for further consideration, evidence was filed to the effect that the assets applicable to payment of the principal and interest of the debentures were insufficient to pay what was due in full. That the Court acted on that view is clear, for, as has been pointed out by my Lord, the plaintiffs by the order on further consideration received their costs of the action as between solicitor and client. And that order on further consideration did not continue the account distinguishing between principal and interest, but discharged the account No. 3 directed by the judgment, and simply said that the trustees were to pass their accounts, and not that they were to distinguish between capital and income; and then the order proceeded to give liberty to apply as to the distribution between the debenture-holders of any moneys for the time being available for the payment of what was due. The order on further

consideration was therefore clearly based upon this: that, as matters then stood, the estate was to be treated as insolvent, and, accordingly, it was not necessary thereafter, unless something unforeseen should occur or the circumstances should change, to bear in mind any distinction between principal and interest. There would be, as I need scarcely say, when the estate was insolvent, no necessity for adhering to the order of payment of interest and principal provided for by clause 11 of the trust deed. So long as the estate was insolvent, the debenture-holders were entitled to say, "As between us and the mortgagors, the order of payment is immaterial if there is not sufficient for payment in full. The order of payment of principal and interest is a matter of perfect indifference as between us and the mortgagors." Accordingly, the order on further consideration did not direct the continuance of the account distinguishing between principal and interest, but proceeded on the footing that thenceforth, unless something not anticipated should occur, the debenture-holders were entitled to treat all the assets as one for their purpose, and need not consider any question of principal or interest. And, after the order on further consideration was made, we find a change in the form of the orders for payment and for distribution of the particular moneys for the time being available. Previously when orders have been made for payment, care was taken to say that the payments were made for interest expressly when interest was due. The interest had been calculated up to October 1, 1894, as appeared by the chief clerk's certificate. The previous orders expressly referred to the interest which had to be paid as found by that certificate. But after the order on further consideration, we find that the form of the orders was changed, and the orders then assumed the form which we have to consider in the two orders of June 15, 1896, and July 21, 1897. [His Lordship referred to the terms of these orders, and continued:—]

Now under the circumstances, what is the meaning of those orders? Did they in effect appropriate any portion of the 1 per cent. and the 10 per cent. respectively towards payment of interest? Did they in effect order those sums to be paid

C. A. 1904 SMITH v. LAW GUARANTEE AND TRUST SOCIETY, LIMITED. Romer L.J.

strictly according to the provisions of the trust deed, or strictly according to the rights which the mortgagees might have had if their opinion had been asked—that is to say, in payment first of interest and afterwards of principal? In my opinion they did not, having regard to the circumstances and to the wording of the orders. Certainly I am of opinion that they did not provide for payment of the moneys pari passu as between principal and interest. What they did, I think, was in effect to reserve the power of the Court to deal with the payments as between principal and interest should there ever thereafter be a necessity for doing so, and not otherwise, and that then, when the Court had to do that, and not before, there was to be an opportunity of saying how those moneys should be finally appropriated and dealt with. To my mind this view is borne out by two little details connected with the orders themselves. Take first the order of June 15, 1896. It is to be noticed that the 1 per cent. which was to be applied was calculated only on the capital sum due on the debentures. And when we come to the order of July 21, 1897, it is to be observed that at that time far more was due for interest alone on the debentures than 10 per cent. on the value of the debentures. Yet the order provided that the 10 per cent. should be applied generally on account of what was due on the debentures for principal and interest. If it had been meant that the 10 per cent. was to be applied strictly according to the trusts of the trust deed, first to interest and then to principal, it is impossible to suppose that the Court would have made an order in that form, because on the face of it there was far more interest due than would have exhausted the 10 per cent. My conclusion, therefore, is that these orders did not finally or completely appropriate any portion of the moneys dealt with to the payment of principal or interest, but left it open to the Court, after hearing the debenture-holders, to say finally how those sums should be dealt with when the necessity for so doing should arise.

That necessity has now arisen, for the Crown raises a question about it; and thereupon I think the debenture-holders are entitled now to say, "This estate is insolvent; it is to our

interest now to have these sums appropriated, if they have not been already appropriated, to capital, and we ask the Court to do this." I think that the Court is under these circumstances bound to do that, and to make the order which has been indicated by my Lord. Under the circumstances I do not think there was any necessity for reserving a right to the debenture-holders to elect, because it is clearly to their interest that the order should be made in this form. The plaintiffs, who represent the debenture-holders, ask for that order, and I think the Court ought under the circumstances to make the order, and not to leave the matter to the election of the debenture-holders individually. I agree to the amendments in the order which have been proposed by my Lord. In substance the decision of the learned judge was correct, and I think the appeal should be dismissed, subject to the alterations indicated in the form of the order, though that ought not to make any alteration as to the costs.

COZENS-HARDY L.J. I agree, and I have nothing to add.

Solicitors: *Solicitor to Inland Revenue; W. H. Smith & Son; Bennett & Chance; Gribble, Oddie & Co.*

W. L. C.

C. A.
1904
July 12, 13; Aug. 11.

WERNER MOTORS, LIMITED *v.* A. W. GAMAGE, LIMITED.

[1902 W. 2607.]

Design—Registration—Infringement—Patent and Registered Design for same Invention—Estoppel—Infringement in Ignorance of Registration—Liability in Damages—Defence of Want of Novelty—Application to vacate Registration—Patents, Designs, and Trade Marks Act, 1883 (46 & 47 *Vict.* c. 57), *ss.* 13, 47, 51, 58, 59, 60, 61, 90.

On November 8, 1901, the plaintiffs applied for a patent for improvements in frames for motor cycles, and delivered a provisional specification. On November 18, 1901, the plaintiffs obtained registration of a design for motor cycles. On August 8, 1902, the plaintiffs delivered a complete specification for the patent, which was accepted on October 23, 1902, and the patent was afterwards granted bearing date November 8, 1901. The complete specification contained a drawing identical with the registered design. In an action by the plaintiffs to restrain the infringement of the design:—

Held, that the validity of the registration of the design was not affected by the subsequent grant of the patent of prior date.

Until the service of the writ in the action the defendants were ignorant of the registration of the plaintiffs' design, but after service of the writ the defendants sold some machines made according to the registered design, and claimed the right to do so, alleging that the registration was invalid, though upon an application for an interlocutory injunction they offered to keep an account:—

Held, that the plaintiffs were entitled to an injunction, but that they could not recover damages in respect of sales made by the defendants before the writ.

Decision of Byrne J., [1904] 1 Ch. 264, affirmed.

Whether in an action to restrain the infringement of a registered design the defence of want of novelty can be maintained in the absence of an application to vacate the registration, *quære*.

Per Vaughan Williams L.J.: A patent right in an article and a copyright in a design for the same article may co-exist, but the registration of a design which secures mechanical advantages may, as an anticipation, prevent the grant of a subsequent valid patent for the article, and that whether the applicant for the patent be the proprietor of the design or a stranger.

A patentee, who registers a design for an article after he has applied for a patent for it, and before the delivery of a complete specification containing a drawing of the article identical with the registered design, is not, by the subsequent grant of a patent bearing the date of his application,

estopped from saying that the design was new and original at the date of registration.

Per Romer L.J.: In most cases it will be very difficult for a patent right in respect of a new article and a copyright in a registered design for the shape of the article to co-exist.

But in such circumstances as those of the present case the two rights, being not necessarily the same, might co-exist, though the right which was second in point of date must be held subject to the first right. The grant of the patent in such a case does not destroy the effect of the registration of the design which was valid at the date when it took place, and this whether the owner of the patent and the owner of the design are the same person or different persons.

APPEAL by the defendants from the decision of Byrne J. (1)

The material facts were as follows:—

On November 8, 1901, the plaintiffs' predecessors in title applied for a patent for improvements in frames for motor cycles. The provisional specification then delivered did not contain any drawings.

On November 18, 1901, the plaintiffs' predecessors applied for and obtained registration of a design for motor cycles.

On August 8, 1902, the plaintiffs, who had then acquired title to the patent and the design, delivered the complete specification of the patent, which contained a drawing or plan identical with the registered design. The specification was accepted on October 23, 1902, and the patent was afterwards granted as of the date November 8, 1901.

This action was brought in August, 1902, to restrain the defendants from applying for the purposes of sale to motor cycles the plaintiffs' registered design, or any fraudulent or obvious imitation thereof.

In November, 1902, the plaintiffs registered a new design for motor cycles, which was very similar to and practically identical with their original design. It was alleged by the defendants that since that date the plaintiffs had sold motor cycles marked only with the new registration number, but in the opinion of Byrne J. this allegation was not proved by the evidence.

By their defence the defendants denied infringement of the plaintiffs' design, and alleged want of novelty in the design.

(1) [1904] 1 Ch. 264.

C. A. 1904 WERNER MOTORS, LIMITED v. A. W. GAMAGE, LIMITED.

The defendants also said that they had not applied the plaintiffs' design to any cycles "knowing that the same had been so applied without the consent of the registered proprietor."

On a motion for an interlocutory injunction the defendants offered to keep an account of sales made by them, though they claimed the right to continue selling cycles made according to the plaintiffs' registered design. At the trial Byrne J. held on the evidence that before the service of the writ the registration of the plaintiffs' design was not known to the defendants, and that consequently the plaintiffs could not recover damages in respect of sales effected before writ.

The defendants raised the further defence that the registration of the design was invalid and was a fraud upon the Crown by reason of the prior application for the patent, which was subsequently granted as of the date of that prior application.

Byrne J. held that the plaintiffs' design was new and original and that it had been infringed by the defendants. The learned judge also held that there was "nothing inconsistent between a grant of a patent and a coincident right and existence of a statutory right to a design." The right conferred by a patent and the right conferred by registration of a design might be co-existent and did not clash. The registration of the design was therefore valid, and the plaintiffs were entitled to the injunction which they claimed.

The defendants appealed.

Cripps K.C., *T. Terrell, K.C.*, and *J. C. Graham*, for the defendants. It is submitted that the plaintiffs' first registered design was not "new or original." The test of what is new or original is shewn by such cases as *Le May* v. *Welch* (1); *Hecla Foundry Co.* v. *Walker, Hunter & Co.* (2) As Bowen L.J. said in *Le May* v. *Welch* (3), there must be "a substantial novelty in the design having regard to the nature of the article," and "that is an issue of fact to be decided by the view." And in the other case Lord Herschell said (4): "the

(1) (1884) 28 Ch. D. 24.
(2) (1889) 14 App. Cas. 550.
(3) 28 Ch. D. 34.
(4) 14 App. Cas. 555.

eye must be the judge in such a case as this, and the question must be determined by placing the designs side by side, and asking whether they are the same, or whether the one is an obvious imitation of the other." Other authorities on the point are: *In re Bach's Design* (1); *In re Rollason's Registered Design* (2); *Heath & Sons* v. *Rollason* (3); *John Harper & Co., Ld.* v. *Wright & Butler Lamp Manufacturing Co.* (4)

[THE COURT expressed a doubt whether the defence of want of novelty could be raised in the absence of an application under s. 90 to vacate the registration of the design.

Ultimately both parties consented to treat the case as if such an application had been made.

VAUGHAN WILLIAMS L.J. said that it must not be taken that the Court had decided whether such an application was necessary.]

Again, it is submitted that the prior application for a patent, which when granted related back to the date of the application, prevents the registration of a design for the same article.

[ROMER L.J. The provisional specification does not amount to publication of the invention.]

No; but the patent is a prior grant by the Crown for the same invention, and it is submitted that there cannot be a second grant for the same thing. If there could, the two might be assigned by the grantee to different persons. Neither a patent nor a registered design could be valid as against one person and not as against another; it must be good or bad as against every one.

[VAUGHAN WILLIAMS L.J. Suppose a patentee obtained an injunction to restrain infringement by a number of small traders, who submitted, and then he sued a large firm, who resisted and proved that the patent was invalid, what would become of the injunctions?]

Perhaps they could be set aside.

[COZENS-HARDY L.J. Would there not be an estoppel as against the small traders?]

If a patent was taken out by A., and before publication B.

(1) (1889) 42 Ch. D. 661.
(2) [1898] 1 Ch. 237.
(3) [1898] A. C. 499.
(4) [1896] 1 Ch. 142.

C. A. 1904 WERNER MOTORS, LIMITED v. A. W. GAMAGE, LIMITED.

applied for a patent for the same thing, it is submitted that the second patent would be invalid on the ground of prior grant. There cannot be two co-existent grants by the Crown for the same thing.

[ROMER L.J. Why should not the registered design be good as against every one except the patentee, his licensees and assigns?]

The prior grant is a grant of a monopoly, and it is submitted that the owner of the subsequently registered design stands in the same position as a second grantee of a patent for the same article.

[ROMER L.J. Suppose before the registration of the design the owner had granted a licence to use the design when registered?]

That would be an agreement to grant a licence, and specific performance of it could be enforced. There cannot be a grant of a monopoly of that which another person is entitled to use.

Another point is that before judgment was given in this action the copyright in the plaintiffs' original design registered on November 18, 1901, had ceased under s. 51 of the Act, because the article when sold was not marked with the prescribed mark denoting that that design was registered. The action was brought upon that registration, not upon the registration of November, 1902. The copyright having thus ceased, the plaintiffs are not entitled to an injunction.

A. J. Walter and *Kerly*, for the plaintiffs. The last point about the marking was not raised in the pleadings.

As to the point that there cannot be a good patent and a good registered design for the same article, there is no authority for that proposition. A registered design is a creature of statute, and all the provisions relating to it must be found in the statute. There is no grant from the Crown; there is only a certificate of registration.

[COZENS-HARDY L.J. Under s. 47 (*b*) the comptroller has power to refuse to register any design presented to him for registration.]

A provisional specification has no picture or tracing in it; there is nothing but a written document. There is no con-

nection between a patent and a design; there is no inconsistency between them. The registration of a design is for the protection of the shape of an article; there cannot be a patent for shape.

[VAUGHAN WILLIAMS L.J. Both are restrictions of the common law right of trading.]

The power of granting letters patent is inherent in the Crown, and that power was limited by the Statute of Monopolies. A patent could only be revoked by means of a scire facias, and now by s. 26 a petition for revocation is substituted. The question of prior grant has never yet been dealt with by the Court, though it has been frequently pleaded. A specification might be registered as a book under the Copyright Act, 1842 (5 & 6 Vict. c. 45). There is nothing in common between a design and a patent. The definition of a design in s. 60 of the Act shews that it is concerned only with "shape." A patent is concerned with "manufacture."

The procedure for revocation of a patent does not apply to a registered design. There is no procedure by which the registration of a design can be refused or invalidated on grounds which would apply to a patent. Registration could not be refused on the ground that a provisional specification had been already filed. An inventor is entitled to obtain all the protection he can. There is no procedure such as scire facias or petition for revocation by which the registration of a design can be vacated on the ground of a prior grant.

[COZENS-HARDY L.J. referred to s. 90.]

As to prior publication, see *Winfield & Son* v. *Snow Brothers* (1); *Blank* v. *Footman, Pretty & Co.* (2) Sect. 61 of the Act speaks of the "author of any new and original design." The inventor would have copyright in a picture or photograph of his machine. It is contended that the evidence proves the design to be new and original.

As regards the marking, s. 51 only requires that "before delivery on sale of any articles to which a registered design has been applied" the proprietor "shall cause each such article to be marked with the prescribed mark . . . . denoting that the

(1) (1890) 8 Rep. Pat. Cas. 15. (2) (1888) 39 Ch. D. 678.

C. A. 1904 WERNER MOTORS, LIMITED v. A. W. GAMAGE, LIMITED.

design is registered." If he fails to do so his copyright is to cease, unless he shews that he took all proper steps to ensure the marking of the article. But this point was not really raised in the defence.

A new design may be founded on an old one, and may to a great extent embody its features: *John Harper & Co., Ld.* v. *Wright & Butler Lamp Manufacturing Co.* (1)

The plaintiffs' secondly registered design was really a new one, and the article was properly marked with the number appurtenant to the second registration.

The fact that a design may also be made the subject of a patent is not an objection to registration: *Hecla Foundry Co.* v. *Walker, Hunter & Co.* (2); *Walker, Hunter & Co.* v. *Falkirk Iron Co.* (3)

Cripps, K.C., in reply.

Cur. adv. vult.

Aug. 11. The following judgments were delivered:—

VAUGHAN WILLIAMS L.J. This is an appeal in an action brought for infringement of a registered design for motor cycles against a decision of Byrne J., whereby he gave judgment against the defendants, and granted an injunction against them, together with an agreed sum for damages.

The plaintiffs became, by a registration dated November 18, 1901, the registered proprietors of a design for motor bicycles, and by this action they claimed an injunction to restrain the defendants from applying, for the purpose of sale, to motor cycles, without licence or written consent from the plaintiffs, the registered design, or any obvious imitation thereof, and from selling or offering for sale motor cycles in infringement of the plaintiffs' registered design.

The defendants denied infringement, and alleged that the registration was invalid for want of novelty, and they alleged also that the sales made by them before action had been made without knowledge of the registration of the design, and they denied the intention to do any wrongful act; and by the last clause in their defence they set up that the registration of the

(1) [1896] 1 Ch. 142. (2) 14 App. Cas. 550.
(3) (1887) 4 Rep. Pat. Cas. 390, 393, 394.

design was invalidated, because a patent had been applied for by the plaintiffs on November 8, 1901 (i.e., ten days before the registration of the design), for a frame for motor cycles, the same as that shewn in the design, and that, the patent having been granted on an application made before the application to register the design, the design was invalidated thereby.

At the trial the defendants also contended, although this defence was not pleaded, that the copyright of the plaintiffs had ceased, because the plaintiffs had registered another design practically identical with that sued on, and had sold machines made according to the latter design without the number of the first design on them. There was no amendment of the pleadings, but Byrne J. disposed of this defence by finding that it was not proved in fact. Byrne J. found that the design was novel; that the defendants had infringed; that the fact of registration was unknown to the defendants before action; and that their acts until then were protected, so far as penalties or damages were concerned; but that, having regard to the subsequent sales and the position taken up by the defendants on the motion and subsequently, absence of knowledge of registration at the date of the writ did not protect the defendants as to such matters, but that the plaintiffs were entitled to an injunction and the agreed damages.

I agree with all the findings of fact by Byrne J., and therefore the only question which has to be disposed of is the question of law raised in the last clause of the defence, namely, is the registration of the design invalidated by the grant of the letters patent?

Now, s. 13 of the Patent Act, 1883, provides that every patent shall be dated and sealed as of the date of application, provided that no proceedings shall be taken in respect of an infringement committed before the publication of the complete specification. The dates in the present case are—date of application, November 8, 1901; complete specification left, August 8, 1902; and accepted, October 23, 1902. The registration of the design was on November 18, 1901, and therefore after the date of application for the patent, but before the leaving of the complete specification.

C. A. 1904 WERNER MOTORS, LIMITED v. A. W. GAMAGE, LIMITED. Vaughan Williams L.J.

Now, on these dates does the date of the letters patent invalidate the registration of the design? It is said that it is invalidated because the Crown cannot grant the sole right of manufacturing an article to two different persons, and can, by the Statute of Monopolies, only grant it to the first and true inventor. It is urged that, having regard to the dates in this case, the Crown had, before the date of the registration of the design, already granted the sole right to make the article. A purchaser, it is said, from the patentee is entitled to do what he likes with the article he has bought, and ought not to be prevented, by the proprietor of a registered design, from so doing. This contention has at first sight considerable force; but I think the answer is, that the logical result of this argument, if sound, is that there cannot be a patent and a design for the same article. This, I think, is not supported by authority. The grant of letters patent and the statutory copyright of the proprietor of the design are different in their legal nature and effect. There is only one grant, that is, of the letters patent, not of the copyright. The copyright "gives protection only to the shape or configuration," although "the result of such protection may be to secure important advantages, such as attend a mechanical contrivance" which might be good subject-matter for a patent: see per Lord Herschell in *Hecla Foundry Co.* v. *Walker, Hunter & Co.* (1)

The fact that the design is calculated to serve some useful purpose leaves it open to every member of the public to attain the same end by using an article which differs from it in shape and configuration: see per Lord Watson. (2) Byrne J. said that the patent right and the copyright may co-exist. I think this is right; but I do not mean to say that registration of a design which happens to secure mechanical advantages may not, as an anticipation, prevent the grant of subsequent valid letters patent. I think it might do so, whether the applicant was the proprietor of the design or a stranger.

It is suggested that in the present case the grant of the letters patent, having regard to the date of the application and therefore of the sealing, prevents the design from being new

(1) 14 App. Cas. 550, 555. (2) 14 App. Cas. 557.

and original within the meaning of s. 47 of the Act of 1883. Now, in the case of a stranger to the letters patent, this clearly would not be the result. Can it be the result in the case of a patentee, who registers the design between the date of a provisional specification without drawings, and the date of a complete specification with a drawing identical with the design, that he cannot obtain a statutory copyright? I think not, unless one can say that the patentee is in some way estopped from asserting the truth that the design, at the date of the application to register, was new, because he subsequently obtained letters patent having a statutory date prior to that of the application to register the design. I have had some doubt on this point, but, on the whole, I regret to say I cannot find such an estoppel or, indeed, any ground for putting the plaintiffs to an election between the letters patent and the copyright of the design. I say I regret, because I think what has been done here is an abuse of that part of the Act of 1883 which relates to designs. The Legislature cannot, I think, have intended that the copyright of designs should be used to protect monopolies the subject of letters patent. For the reasons I have given I think that this appeal must be dismissed.

ROMER L.J. In most cases it will be very difficult for a patent right in respect of a new article, and the right to a design registered under the Act for the shape of the article, to co-exist. For example, if the patent is granted first, and the patented article is published to the world, a design of that article cannot afterwards be held to be novel so as to justify a subsequent application for registration under the Act. If the design of the article was first registered and published, there could not be a subsequent patent merely for that article without any substantial alteration. But in some circumstances the two rights may, I think, co-exist, as in the present case, when there is first the provisional specification and no publication of the patented article before registration of the design of the article under the Act, and that is followed by the final specification.

C. A. 1904 WERNER MOTORS, LIMITED v. A. W. GAMAGE, LIMITED. Romer L.J.

In such circumstances I think the two rights, being not necessarily the same, may exist together, though, no doubt, to a certain extent they may overlap and interfere the one with the other. But I think the difficulty is met by saying that the right which is second in point of time must be held subject to the first right. In the case of a patent right, seeing that the patent dates as from the date of the provisional specification, this gives rise, as in the present circumstances, to some, but I think not an insuperable, difficulty. After the provisional specification and before the design was registered, there was no publication of the patented article. Take then a case in which there is an independent inventor of the design ignorant of the provisional specification, and, of course, there being no publication, wholly ignorant of the patented article; his design at the date of his application for registration being novel, he obtains registration of the design. In that case it appears to me that he would be entitled to say that he had a good registered design under the Act. And though, when the patent was subsequently perfected by the final specification, so that the patent right operates as from the date of the provisional specification, the only effect of that would be that the owner of the registered design must take his right subject to the rights of the patentee. But I cannot in such a case see any reason why the grant of the patent, on the subsequent filing of the final specification, should destroy the effect of the registration of the design, which, as I have pointed out, was at the date of the registration perfectly good.

It was suggested, however, that though two independent persons might, under the circumstances I have indicated, possess independent rights in the patent and the design respectively, yet one and the same person could not possess both rights. On full consideration I cannot see any sufficient reason for so holding. If two independent persons could hold the two rights respectively, I cannot see why one person should not hold them both. Consider the case of a patentee who files his provisional specification. He may be in doubt whether his patent will ultimately be held good, though he hopes and believes that it is good. But he is certain that the design of

the article is perfectly novel, and that he is entitled to have that design registered. Therefore, after filing his provisional specification, he applies for registration of the design, and the design is duly registered and he acquires rights under the registration. Then suppose that, contrary to his hopes, his patent is held to be bad: is there any reason in these circumstances why he should not still retain the rights which he obtained by the registration of the design? Is it to be held that he has lost his right to the design, which is otherwise good, merely because, in the circumstances which I have indicated, the patent has been held to be bad? I think not. Difficulties may no doubt arise with regard to damages in a case in which an infringer of the patent is sued both by the patentee for infringing the patent and by the owner of the registered design for infringing the design. But I think such a difficulty can be adequately dealt with by the Court when it arises. I have no doubt that in such a case the Court would see its way to do substantial justice. In dealing with such a case I think the Court should bear in mind that inter se one of the two rights must of necessity be held subject to the other. In my opinion, therefore, this appeal must be dismissed, for I cannot differ from the conclusion arrived at by Byrne J. that there was good subject-matter for the registration of the plaintiffs' design, and that their right in respect of the registered design has been infringed by the defendants.

Cozens-Hardy L.J. This is an appeal from a decision of Byrne J., who granted an injunction restraining the defendants from infringing a registered design. [His Lordship stated the facts, and continued:—]

On behalf of the appellants three points have been raised. (1.) It is said that the right acquired by registration of the design on November 18, 1901, is in some way lost or affected by the grant of the letters patent, which when granted bore date November 8, 1901, inasmuch as protection of the design for five years is inconsistent with the protection which the plaintiffs acquired by the patent for fourteen years from an earlier date. I do not think this argument can prevail. It

C. A. 1904 WERNER MOTORS, LIMITED v. A. W. GAMAGE, LIMITED. Cozens-Hardy L.J.

seems to me that a monopoly right was acquired by registering the design on November 18, and that this right was in no way prejudiced or affected by the application in the final specification of this registered design to the patented article. The patent is not for the registered design. The patent may be used or infringed in many ways not involving the use of the registered design. The plaintiffs do not in this action complain of an infringement of the patent; they complain solely of an infringement of the registered design.

(2.) In the second place, it is contended that the design is not a new or original design within the meaning of the Act of 1883. [His Lordship referred to the evidence on this point, and continued:—]

Upon the whole, I see no sufficient reason for differing from the decision of the learned judge on this point.

(3.) In the third place, it was contended that by reason of s. 51 of the Act of 1883 the plaintiffs were not entitled to an injunction, inasmuch as, after action brought and before trial, cycles, to which the registered design had been applied, had not been marked with the prescribed mark before delivery on sale. This point was not raised in the pleadings, but it arose on the cross-examination of the manager and secretary of the plaintiff company. It is suggested that the plaintiffs registered a second design only colourably differing from the first registered design, and attached the second number only to the cycles so sold. But, in my opinion, the evidence is not sufficient to prove the facts alleged. The second registered design was not put in evidence in the Court below, and I am not satisfied that it differs from the first only in colourable details. No proof of an actual sale was given, and I think it would be dangerous to allow the plaintiffs' title, if otherwise unimpeachable, to be defeated by means of evidence so loose and unsatisfactory. In my opinion this appeal must be dismissed with costs.

Solicitors: *Ward, Perks & McKay; J. B. & F. Purchase.*

W. L. C.

MANNERS *v.* ST. DAVID'S GOLD AND COPPER MINES, LIMITED.

C. A.
1904
JOYCE J.
June 10, 17; *July* 5, 12.
C. A.
July 30.

[1904 M. 1512.]

Company — Reconstruction — Ultra Vires — Memorandum of Association — Powers—Power to sell Undertaking for Shares in another Company and to distribute same in Specie—Sale in exercise of Powers of Memorandum—Sale of Undertaking to New Company for partly paid Shares—Winding-up—Option to Shareholders of Old Company to take up New Shares—Time Limit for exercising Option—Forfeiture of Shareholders' Interest in default—Realization of rejected Shares and Application of Proceeds in Reduction of Purchase-money—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *ss.* 133, 161.

A company was empowered by its memorandum of association to sell its undertaking for shares in any other company, whether wholly or partly paid up, and to distribute the shares in specie, but so that no distribution amounting to a reduction of capital could be made without the sanction of the Court. The capital of the company having been fully paid up, and the company being in need of further capital, a scheme of reconstruction was adopted whereby the undertaking of the company was to be sold to a new company in consideration (among other things) of partly paid shares in the new company of the same number and nominal amount as the fully paid shares in the old company, and the shareholders in the old company were to have the option of taking those new shares in exchange for their existing shares; and in the event of the old company going into liquidation within a certain period after the completion of the purchase and distributing the shares of the new company, the liquidator was to fix a time within which the new shares were to be taken up; and any shares not accepted within that time were to be realized and applied in reduction of the obligations of the new company under the scheme. This scheme was embodied in an agreement entered into between the two companies:—

Held (affirming Joyce J.), that the agreement was not a contract for sale within the contemplation of the memorandum of association, but was a device to compel fully paid shareholders to contribute further capital or forfeit their interest in the company, and that it was ultra vires.

THIS was a motion for an injunction to restrain the St. David's Gold and Copper Mines, Limited, and its liquidator from parting with the assets of the company without making proper provision for payment or satisfaction to the plaintiff of his "distributive share in the assets as a shareholder of the company."

C. A. 1904 MANNERS v. ST. DAVID'S GOLD AND COPPER MINES, LIMITED.

The real object of the motion was to prevent the company from acting upon a scheme of reconstruction embodied in an agreement of July 23, 1903, to the prejudice of the plaintiff.

At the date of the commencement of the liquidation of the company the plaintiff was the registered holder of 444 fully paid shares therein of 5*s.* each.

The company was incorporated under the Companies Acts, 1862 to 1893, in May, 1898, with a nominal capital of 60,000*l.*, divided into 60,000 shares of 1*l.* each ; but the 1*l.* shares were subsequently divided into 240,000 shares of 5*s.* each. The capital was fully paid up. The objects of the company were defined by clause 3 of the memorandum of association to be to acquire and to work, develop, and turn to advantage certain mining leases and property known as the Clogan Gold Mines, and in connection therewith to execute a certain agreement mentioned in the memorandum, and the clause continued as follows :—

"And for the purposes aforesaid, so far as may be deemed necessary or expedient"—(among other things) "(*f*) To sell and dispose of any of the property of the company or the whole undertaking, and to accept in payment for the same money or wholly or partly shares, bonds, debentures, or other securities of any other company, whether wholly or partly paid up.

"(*h*) To acquire, hold, or dispose of, any shares or securities of any other company, with power to distribute the same in specie either by way of dividend or otherwise, but so that no distribution amounting to a reduction of capital can be made without the sanction of the Court."

"(*n*) To do all such other things, whether of the like or other sorts, as may be considered incidental or conducive to the attainment of the above objects or any of them or to the conversion or disposition of any security or property held by the company."

Clause 116 of the articles of association provided as follows : "The dissolution of the company may be determined on by a special resolution for any purpose whatever, and whether the object be the absolute dissolution of the company, or the amalgamation of the company with any other company, or

any other object, and upon any reconstruction, modification or amalgamation it shall be lawful for the liquidators to accept shares in any other company then constituted, or thereafter to be constituted, in payment for the business and property of the company, or any part thereof; and to distribute the same among the members of this company, in exchange for their shares in this company; and in the event of any such arrangement, no member of this company shall have any of the rights given to a dissentient member by the 161st section of the Companies Act, 1862; but every such member shall be bound to accept in exchange for his shares the shares appropriated to him in such other company as aforesaid, or shall be entitled by notice given to this company not later than fourteen days after the passing of the special resolution to require the liquidators to sell the shares in such other company appropriated to him as aforesaid, and to pay him the net proceeds of the sale thereof; and such net proceeds shall in such case be accepted by him in full satisfaction of all claims and demands against this company or the liquidators thereof, in respect of his shares therein, and such sale may be made in such manner as the liquidators shall think fit."

In 1903, owing to a long period of low returns from the mine, the company had spent all its capital, and had also spent a further sum of 40,000*l.* which it had raised on debentures, and in these circumstances, if the working of the mine was to be continued, it became necessary to raise further capital. Accordingly the directors put forward a scheme of reconstruction, which was thus described in an explanatory circular sent to the shareholders. After explaining the need of further working capital, the circular continued: "It has been decided, therefore, to sell the company's entire property to a new company named the St. David's Gold Mines (1903), Limited. The terms of the sale will give to each shareholder in the present company who comes into the scheme the right to acquire for every existing five shilling share a new share of the same nominal amount with four shillings paid and a liability of one shilling," to be discharged in the manner therein mentioned. "This will enable the company to be provided with 12,000*l.*

C. A. 1904 MANNERS v. ST. DAVID'S GOLD AND COPPER MINES, LIMITED.

working capital. . . . . Should there be any shares not applied for the new company will have power to dispose of them at par, at a premium, or otherwise, to the exclusion of the shareholder who omits to apply: the proceeds of any of such shares will be applied towards payment of the debts of the old company." The new company was to have the same directors and the same solicitors as the old company.

The new company was accordingly registered, and an agreement dated July 23, 1903, was entered into between the old company of the one part and the new company of the other part. After providing for the sale of the property and goodwill of the business of the old company to the new company, the agreement continued as follows:—

"3. As part of the consideration for the said transfer the new company shall allot to the old company or as it may direct two hundred and forty thousand shares of five shillings each upon each of which the sum of four shillings shall be credited as paid for all purposes.

"4. As further consideration for the said transfer the new company shall subject as hereinafter mentioned pay satisfy and fulfil and indemnify the old company against all the debts liabilities and engagements of the old company and in case it shall go into liquidation within twelve months from completion of the said purchase the new company shall pay all expenses of and incident to such winding-up.

"5. In case the old company shall go into liquidation within the time aforesaid and distribute the shares forming the consideration for the said sale among its members all shares not accepted by such members within twenty-one days of the commencement of the winding-up or such extended time as the new company shall consent to shall be sold by the old company and shall be applied in payment of debts and liabilities of the old company in relief of the obligation of the new company under this agreement."

The agreement also contained a clause enabling either party to rescind the agreement in the event of 150,000 shares in the new company not being allotted within two months from the date thereof.

At an extraordinary general meeting of the old company held on July 31, 1903, after a resolution had been passed approving and adopting this agreement, the following further resolutions were passed :—

"1. That having regard to the agreement dated the 23rd day of July, 1903, for the sale of the undertaking of this company to the St. David's Gold Mines (1903), Limited, it is desirable to wind up this company, and accordingly that this company be wound up voluntarily, and that James Junner be and he is hereby appointed liquidator for the purpose of such winding-up.

"2. That the said liquidator be and he is hereby authorized to distribute in specie 240,000 shares in the St. David's Gold Mines (1903), Limited, which form part of the consideration for the said sale among the contributories of this company rateably according to the amounts paid on the shares of this company held by them respectively, and so that each contributory shall be entitled to have his or her proportion thereof allotted to himself or herself, or to his or her nominee or nominees, and further that the said liquidator do fix a time within which all such shares if not accepted shall be deemed to have been refused.

"3. That the said liquidator do sell the shares so refused and apply the net proceeds of such sale in or towards the discharge of any debts of this company $\frac{\text{and}}{\text{or}}$ of the costs and expenses of its winding-up in accordance with the terms of the said agreement for sale."

These resolutions were duly confirmed at a second extraordinary general meeting of the company held on August 17, 1903.

In pursuance of these resolutions the liquidator, by notices sent out to the shareholders of the old company on August 31, fixed September 7 as the time limit within which the shares in the new company must be applied for; but by subsequent notices the time was extended until the middle of November. Owing to the plaintiff having changed his address without communicating the fact to the company, he knew nothing of this scheme of reconstruction until May, 1904,

C. A. 1904 MANNERS v. ST. DAVID'S GOLD AND COPPER MINES, LIMITED.

when the rejected shares, amounting in the aggregate to 30,000, either had been or were in the course of being realized by the liquidator, and applied in accordance with the terms of the agreement. Upon the refusal of the liquidator to exchange the shares which the plaintiff held in the old company for shares in the new company, the plaintiff in June, 1904, commenced this action against the old company and its liquidator for a declaration that the special resolutions passed and confirmed on July 31, 1903, and August 17, 1903, were void so far as they provided for the distribution of the assets of the company amongst the members thereof otherwise than in accordance with their rights and interests in the company, with consequential relief, and moved for an injunction in the terms above stated. Subsequently, by leave of the Court, the new company was added as a defendant to the action, and a claim was inserted in the writ for a declaration that the agreement of July 23, 1903, was ultra vires and void; and the new company was also added as a respondent to the motion.

The motion came on for hearing before Joyce J. on June 10, 1904.

W. F. Hamilton, K.C., and *P. Tindal-Robertson*, for the plaintiff. The plaintiff is entitled to prevent the liquidator from dealing with the proceeds of sale of the company's undertaking in such a way as to deprive him of his rights under s. 133 of the Companies Act, 1862. What has been done is ultra vires. Except under the provisions of s. 161 of the Act of 1862, a shareholder cannot be deprived of his right to a distributive share of the assets. That it cannot be done by the articles of association is settled by *Baring-Gould* v. *Sharpington Combined Pick and Shovel Syndicate* (1) and *Payne* v. *The Cork Co.* (2) We submit that it cannot be done under this memorandum of association. If it had been done under s. 161, the plaintiff might have been bound: *Doughty* v. *Lomagunda Reefs, Ld.* (3)

Various devices have been tried to get over the obligation

(1) [1899] 2 Ch. 80. (2) [1900] 1 Ch. 308.
(3) [1902] 2 Ch. 837.

of complying with s. 161. This clause—3 (*f*)—in the memorandum is one of them. If it is proposed to act under s. 161, the shareholders must have express notice. In this case there was nothing in the notices or circulars to shew a shareholder that, if dissatisfied, he must dissent: *Imperial Bank of China, India, and Japan* v. *Bank of Hindustan, China, and Japan* (1); *Ex parte Fox*. (2) But it is evident that s. 161 was not proceeded under, because the whole of the property of the company was parted with, and no provision made for satisfying dissentient shareholders. Where a company has power under its memorandum of association to sell all its undertaking, and, while a going concern, contracts to do so, it must be taken that the sale is in pursuance of the power, and that no shareholder has a right to dissent: *Cotton* v. *Imperial and Foreign Agency and Investment Corporation* (3); *Doughty* v. *Lomagunda Reefs, Ld.* (4)

There cannot be confiscation except under statutory power, and that power, where it exists, must be strictly exercised.

[They also referred to *Wall* v. *London and Northern Assets Corporation* (5), *Clinch* v. *Financial Corporation* (6), and to Palmer's Company Precedents, 8th ed. Pt. I. pp. 306, 1296, 1297.]

Hughes, K.C., and *Kirby*, for the old company and its liquidator. We admit that we are not proceeding under s. 161. There is power under the memorandum of association to sell the company's undertaking for shares in another company, and to distribute such shares in specie. It is reasonable to provide that shareholders who do not accept the new shares shall lose their interest in the undertaking: *Postlethwaite* v. *Port Phillip and Colonial Gold Mining Co.* (7) It is true that that was a case under s. 161, but the ground of the decision did not depend on that section; so also in *Burdett-Coutts* v. *True Blue (Hannan's) Gold Mine*. (8) The cases of *Baring-Gould* v. *Sharpington Combined Pick and Shovel Syndicate* (9) and *Payne* v. *The*

(1) (1868) L. R. 6 Eq. 91.
(2) (1871) L. R. 6 Ch. 176.
(3) [1892] 3 Ch. 454.
(4) [1902] 2 Ch. 837.
(5) [1898] 2 Ch. 469.
(6) (1868) L. R. 5 Eq. 450.
(7) (1889) 43 Ch. D. 452.
(8) [1899] 2 Ch. 616.
(9) [1899] 2 Ch. 80.

C. A. 1904 MANNERS v. ST. DAVID'S GOLD AND COPPER MINES, LIMITED.

Cork Co. (1) do not apply. If you are proceeding under s. 161, no doubt you must do so throughout, and a company cannot by its articles take away the rights of a dissentient shareholder. Those cases do not apply where, as here, the sale is not under s. 161, but under the power contained in the memorandum. All the cases where it has been held that it is reasonable to fix a limit of time within which application must be made for the new shares are just as applicable where the sale is under the powers of the memorandum as where it is under s. 161: *Postlethwaite* v. *Port Phillip and Colonial Gold Mining Co.* (2); *Clinch* v. *Financial Corporation* (3); *Doughty* v. *Lomagunda Reefs, Ld.* (4); *Burdett-Coutts* v. *True Blue (Hannan's) Gold Mine.* (5) Cases like *Baring-Gould* v. *Sharpington Combined Pick and Shovel Syndicate* (6) and *Payne* v. *The Cork Co.* (1) do not apply to what is merely an option to the shareholders to take the shares where the sale has been effected, and only distribution remains.

Younger, K.C., and *Eastwood*, for the new company. A company has purchased a gold mine and paid the full purchase-money, and not the vendor, but a shareholder in the vendor company asks for an injunction to deprive the purchaser of that which he has bought and paid for. Such an injunction could only be granted on terms. The plaintiff is debarred by delay and acquiescence. His only right is a personal remedy against the liquidator, and no injunction should be granted which would affect the rights of the new company. As regards the principle of law, it is just as essential that a time limit should be imposed in the case of an agreement under the powers of the memorandum as it is in the case of an agreement under s. 161; and it is conceded that if this agreement were under s. 161 the plaintiff would have no case.

[They referred to *Griffith* v. *Paget* (7); *Booth* v. *New Afrikander Gold Mining Co.* (8)]

W. F. Hamilton, K.C., in reply. 1. Under a sale by the com-

(1) [1900] 1 Ch. 308.
(2) 43 Ch. D. 452.
(3) L. R. 5 Eq. 450.
(4) [1902] 2 Ch. 837.
(5) [1899] 2 Ch. 616.
(6) [1899] 2 Ch. 80.
(7) (1877) 5 Ch. D. 894.
(8) [1903] 1 Ch. 295.

pany the proceeds of sale become the assets of the company. This contract could not provide for the distribution of the assets. These partly paid shares being assets must be distributed by the liquidator amongst the members according to their rights and interests in the company. The memorandum of association sanctions sales and not schemes of arrangement, and this contract is a scheme of arrangement. It is not within the power, and is, therefore, ultra vires and void. If it is within the power, I submit that no provisions in a memorandum or articles of association can overrule an Act of Parliament. I take my stand on s. 133 of the Companies Act, 1862, and what is proposed to be done is in contravention of that section: *Griffith* v. *Paget*. (1) I am not concerned with *Postlethwaite* v. *Port Phillip and Colonial Gold Mining Co.* (2) or *Burdett-Coutts* v. *True Blue (Hannan's) Gold Mine*. (3) They were both cases of transfers under s. 161, which empowers a liquidator to enter into an arrangement whereby the members of the selling company may receive benefits from the purchasing company. In the former case there was no confiscation; in the latter case what was done came expressly within the words of s. 161. Under that section it is the liquidator who sells.

2. In this memorandum there is no clause which attempts to interfere with the rights of a shareholder in a winding-up.

3. To uphold this agreement would be to enrich the rich shareholder at the expense of the poor. In this case the majority are receiving more than they are entitled to, the minority nothing. The shares of the majority in the new company are much more valuable because 30,000 have been forfeited and the proceeds of sale have been paid to the new company.

Cur. adv. vult.

July 12. JOYCE J. (after referring to the agreement of July 23, 1903). The agreement contemplated a winding-up; but it is admitted that the intended sale is not in any way under the powers or provisions of s. 161 of the Companies Act, 1862,

(1) 5 Ch. D. 894. (2) 43 Ch. D. 452.
(3) [1899] 2 Ch. 616.

C. A. 1904 MANNERS v. ST. DAVID'S GOLD AND COPPER MINES, LIMITED. Joyce J.

which would have given to dissentient members certain rights. It follows, then, that the only authority, if any, for the agreement in question must be found, if at all, in the provisions of the memorandum of association of the old company, which, so far as relevant, are to the effect that the objects of the company are to acquire and work certain gold mines and so on, and, for the purposes aforesaid, so far as may be deemed necessary or expedient, to sell and dispose of any of the property of the company, or the whole undertaking, and to accept in payment for the same money or shares, with the power to distribute the shares in specie, either by way of dividend or otherwise, but so that no distribution amounting to a reduction of capital can be made without the sanction of the Court. It is true that the last of the articles of association provides, in a certain event, that in the case of the powers of the 161st section being brought into requisition the shares of dissentient members should be sold, and that they should be paid the net proceeds. But it is pretty clear, and I think it is admitted, that that article is invalid for the reasons stated in the two cases of *Baring-Gould* v. *Sharpington Combined Pick and Shovel Syndicate* (1) and *Payne* v. *The Cork Co.* (2), which were cited in argument.

Therefore the question which I have to determine is whether the power in the memorandum of association to accept shares in payment on a sale of the undertaking, and to distribute those shares in specie, comprises or confers an authority to sell upon the terms of this agreement of July 23, 1903, and, in particular, upon the terms of clauses 3, 4, and 5 thereof, the 5th clause providing that the shares that would be coming to the members who refused to accept them shall be sold and applied in reduction of the purchase-money. These terms contain no such provision as is to be found in art. 116 of the articles, and, if they can be imposed, any refusing or dissentient member has no such rights as s. 161 of the Companies Act would have given him if the proceedings had been under that section. Having considered the case, I have come to the conclusion that the memorandum does not confer the

(1) [1899] 2 Ch. 80. (2) [1900] 1 Ch. 308.

requisite authority. Certainly it does not expressly authorize what is proposed, nor is such an arrangement, in my opinion, reasonably necessary for the exercise of such powers as are expressly conferred; in other words, I hold that the requisite authority is not to be found there, and if so it appears to me not to exist at all. This is really, as was pointed out by counsel for the plaintiff, a sale in exchange for an option to the members of the old company to take shares upon which there is a considerable liability, and which they could not be compelled to take, the consequences of refusal being the loss of the existing paid-up shares held by the refusing members. Obviously and avowedly the whole transaction is a device to compel the members to provide additional capital when no further call could be made. I think it is a device which is not valid in law, and the proposed mode of treating dissenting members is not reasonable unless they have expressly contracted to subject themselves to such treatment.

This is said to be a case of first impression, and not covered by authority. At all events, I do not see my way to decide that persons holding shares upon the terms of the memorandum and articles in question can without their consent be dealt with as proposed in the present case.

If it is necessary to decide the question, as at present advised, I am of opinion that the agreement is ultra vires. The plaintiff is, therefore, entitled to the injunction for which he asks.

W. F. Hamilton, K.C. I ask for an injunction in the same terms as the undertaking given by the liquidator in the case of *Baring-Gould* v. *Sharpington Combined Pick and Shovel Syndicate*. (1) A similar undertaking was given in *Payne* v. *The Cork Co.* (2) The injunction will be to restrain the liquidator from parting with the assets of the old company without setting apart a sufficient sum to answer what may be found due to the plaintiff.

JOYCE J. Very well; I make the order.

G. A. S.

(1) [1899] 2 Ch. 80. (2) [1900] 1 Ch. 308.

C. A.
1904
MANNERS
v.
ST. DAVID'S GOLD AND COPPER MINES, LIMITED.
C. A.

The old company and its liquidator appealed, and asked that the motion might be refused; and there was also a cross-notice of contention by the new company to the same effect. The appeal came on for hearing on July 30, 1904.

Hughes, *K.C.*, and *Kirby*, for the appellants, repeated the arguments urged in the Court below.

Younger, *K.C.* (*Eastwood* with him), for the new company, proposed to address the Court, but the Court, having heard both counsel on behalf of the appellants, declined to hear him.

W. F. Hamilton, *K.C.*, and *P. Tindal-Robertson*, for the plaintiff, were not called upon.

ROMER L.J. I may state very shortly my reasons for dismissing this appeal.

This is not a case where what has been purported to be done is justified under s. 161 of the Companies Act, 1862. That section would not justify such an agreement as that of July 23, 1903, if it had been entered into by a liquidator; but it was not an agreement entered into under s. 161 at all; and admittedly that section does not apply. If what has been done was justified by the agreement of July 23, 1903, then the subsequent resolutions, of course, would be valid; but if the agreement in question was ultra vires of the company, then I need scarcely say that the subsequent resolutions would not make that agreement valid.

Now how can the agreement be justified as a contract made by the company as a going concern?

It is said that it could be justified as a sale coming within one of the powers of the company conferred by clause 3 of the memorandum, sub-ss. (*f*), (*h*), and (*u*). Now I may put the matter very shortly. The sale contemplated by sub-s. (*f*) is a sale out and out of the undertaking, and a sale which would result in the assets obtained by the selling company as the price of the sale of its undertaking as a going company to another company being part of the capital assets of the selling company.

You could not, of course, on such a sale make a contract with the purchasing company that the assets of the selling company

should be divided amongst the shareholders of the selling company. You could not return capital in that way among the shareholders in a going concern.

But it is said that you can justify a provision in such a contract whereby, as in this case, it is made a term of the contract that if a liquidation takes place, then the liquidator shall divide the assets in a particular way, and so that if a shareholder does not choose to take upon himself a particular liability which he is not bound to take upon himself, his share of the assets shall be forfeited and the proceeds handed over to the purchasing company. To my mind such a contract is altogether ultra vires of the selling company. It is not justified as a sale under sub-s. (*f*). The purchasing company has no right or power to make it a term of such contract that the assets shall be dealt with in that way, nor can the selling company under the pretended exercise of the powers of sub-s. (*f*) pretend to sell its assets with a special contract in favour of the purchasing company that, if a liquidation takes place within a year, the liquidator shall be bound to do something which otherwise the liquidator might not be bound to do, and further that individual shareholders shall be bound to lose their share of the assets, as I have said, for the benefit of the purchasing company if they do not choose to take upon themselves a liability which they are not bound to take upon themselves.

In my opinion such a contract as that which I have mentioned is not a contract of sale and disposition at all, such as is contemplated by sub-s. (*f*) of the memorandum of association of the selling company.

If this transaction cannot be justified as a sale under the powers conferred by the memorandum of association of the company, still less can it be justified by saying, "Look at the substance of it; treat this agreement as being one with a reconstruction of the company, as one with a liquidation, all being one scheme or device; and look at the object of the scheme and device, and see whether that in substance was not one that could be carried through"; because, if I do adopt that view and look at the substance of the scheme and treat it

C. A. 1904 MANNERS v. ST. DAVID'S GOLD AND COPPER MINES, LIMITED. Romer L.J.

as a whole, it comes to this: It is a scheme whereby the shareholders of a company who have paid up their shares in full and are not under any liability to furnish any further capital are told, "You must pay up more capital, and if you do not you shall forfeit all share and interest in this company as a going concern." Such a scheme is wholly improper and ultra vires.

Therefore, whether you look at this scheme as a matter of detail or whether you look at the substance as a whole, it appears to me that equally it was ultra vires and improper, and that the judgment of the judge in the Court below was quite right.

COZENS-HARDY L.J. I agree. In the first place, one cannot help seeing this—that the agreement of July 23, 1903, is not an agreement conditional upon a winding-up. Upon the face of it it contemplates that there may not be a winding-up until after twelve months, because clause 4 imposes certain obligations upon the purchasing company if the winding-up takes place within twelve months, which obligations will not rest upon them if the liquidation does not take place until after twelve months. It is also quite clear that the transaction is not one under s. 161, and that if it can be supported at all it must be supported as falling within sub-s. (*f*) of clause 3 of the memorandum. I do not desire to go again over the ground which has been traversed by my Lord, but it seems to me to be impossible to support this agreement as a sale within the meaning of that sub-section. The agreement is a document which purports to impose certain obligations upon the liquidator in the event of a winding-up, and to impose certain penalties upon a shareholder in the old company if and when the liquidation takes effect. It is something altogether different from a contract within the contemplation of sub-s. (*f*), which is a contract for a sale out and out of the whole undertaking, which may be for shares, but the shares when received by the going company must be dealt with as part of the assets of the going company, or distributed in due course under the winding-up of the company. It seems to me, for the reasons which

have been stated by my Lord and indicated by Joyce J., that the agreement itself is ultra vires, and that no rights can be claimed under it.

Quite apart from that, I desire to express my entire agreement with the last observations of my Lord. The agreement is, as it seems to me, not one which is fair or reasonable in itself. It is an attempt to compel a shareholder to find further money or to forfeit a property which ex hypothesi is of value; because our attention has been called to the notices under which it is apparent that the liquidator is offering those 30,000 shares for sale, and that they are shares which have a value of their own; and the proposition is really that these shares which are of value shall be realized and the proceeds not go to the old shareholders in the company, but be put into the pockets of the new company. That apart from the point of ultra vires seems to me a transaction so unfair and so unreasonable that the Court ought not to give effect to it.

Solicitors for plaintiff: *Pettitt & Valentine.*
Solicitors for defendants: *Trinder, Capron & Co.*

H. B. H.

C. A.
1904
BUCKLEY J.
Feb. 5, 6.
C. A.
June 17, 18.

In re DAVID PAYNE & CO., LIMITED. YOUNG *v.* DAVID PAYNE & CO., LIMITED.

[1902 D. 455.]

Company—Debenture—Ultra Vires—Borrowing Powers—Unauthorized Application of Funds—Knowledge of Director of lending Company of intended Misapplication—Imputed Notice.

Where a company has a general power to borrow money for the purposes of its business, a lender is not bound to inquire into the purposes for which the money is intended to be applied, and the misapplication of the money by the company does not avoid the loan in the absence of knowledge on the part of the lender that the money was intended to be misapplied.

Davis's Case, (1871) L. R. 12 Eq. 516, overruled on this point.

K., who was a director of company A. and was also interested in company B., having ascertained in his private capacity that company B. proposed to borrow a sum of money for a purpose outside the scope of its business, induced company A. to advance the money to company B. on the security of a debenture of that company, and the money was applied by company B. in the manner proposed. Company B. had a general power of borrowing under its memorandum and articles of association for the purposes of its business. No other director of company A. except K. knew how the money was intended to be applied:—

Held, that K.'s knowledge ought not to be imputed to company A. inasmuch as K. owed no duty to that company either to receive or to disclose information as to how the borrowed money was to be applied, and that the debenture was a valid security.

Decision of Buckley J. affirmed.

THIS was an application by the liquidator in the winding-up of David Payne & Co., Limited, for a declaration that a second mortgage debenture for 6250*l.*, purported to have been issued by that company to the Exploring Land and Minerals Company, Limited, was ultra vires and void, and did not constitute a charge on the undertaking or assets of the borrowing company.

David Payne & Co. was incorporated in 1894 for the purpose of acquiring the business of a printers' and stationers' engineer and machinist lately carried on by John Payne at Otley, Yorkshire.

The memorandum of association, in stating the objects of the company, contained the following clause :—

" (M) To borrow and raise money for the purposes of the company's business in such manner as the company shall think fit, and in particular by the issue of debentures or debenture stock, perpetual or otherwise, charged upon all or any of the company's property (both present and future), including its uncalled capital."

Clause 114 of the articles of association, which defined the powers of the directors, empowered them to (amongst other things)—

" (D) Borrow, or raise, or secure any sums or sum of money on the security of the property of the company (including uncalled capital, if any), or any part thereof, either by way of mortgage with or without power of sale, or of debentures or debenture stock or other security, or without security and upon such terms as to payment, interest, or redemption, or otherwise as they may think fit, and out of the assets of the company redeem and pay such securities and loans . . . ."

The evidence in this case was very unsatisfactory, consisting mainly of an affidavit of one Johnston, an American engineer and inventor, who died before he could be cross-examined on his affidavit ; but the facts found by the Court for the purposes of this application may be thus stated :—

In 1900 David Payne & Co. was in difficulties, and from that time forward until its winding-up in March, 1902, the control of the company was assumed by Johnston. Johnston had also the control of three other companies connected with the printing trade, namely, the Johnston Foreign Patents Company, the Johnston Die Press Company, and the Johnstonia Engraving Company. In the beginning of 1902 he put forward a scheme of amalgamation, under which a new company was to be formed for the purpose of acquiring the business of all the companies in which he was interested. At this time the three Johnston companies were insolvent, and Johnston wanted money to pay an instalment of 2000*l.* which was about to become due from him to an American company in respect of certain patents which he had purchased.

C. A. 1904 DAVID PAYNE & CO., LIMITED, *In re.* YOUNG *v.* DAVID PAYNE & CO., LIMITED.

Moreover, Messrs. Montagu Young & Co., a firm of stock-brokers who had made large advances to Johnston for the purposes of this amalgamation scheme, desired to be further satisfied in respect of their position. Mr. Kolckmann, a member of the firm, was also interested in this scheme on his own account, and was to receive 25,000*l.* in shares if the scheme was carried through. In this state of things an interview took place on February 13, 1902, between Johnston, Kolckmann, and a Mr. Pakeman, a member of the firm of Pakeman & Read, who acted as solicitors to David Payne & Co. It was then arranged that Kolckmann, who was a director of the Exploring Land and Minerals Company, should induce that company to advance 6000*l.* on the security of a second mortgage debenture in David Payne & Co., in order to provide for the instalment of 2000*l.* and to keep the three Johnston companies in funds pending the amalgamation, and it was further arranged that Kolckmann's firm should extend the amount of their advances to Johnston to 30,000*l.* in consideration of Johnston's transferring to them all his securities, including the debentures which he was to get in the amalgamated company.

On February 17 Kolckmann called on Mr. Bourke, the chairman of the Exploring Land and Minerals Company, and suggested that that company should lend to David Payne & Co. a sum of 6000*l.* for thirty days upon a second mortgage debenture for 6250*l.*, the 250*l.* being the price to be paid by David Payne & Co. for the accommodation; but he did not tell Bourke how the 6000*l.* was going to be applied. Bourke agreed to the money being advanced, and on the following day, February 18, a cheque for 6000*l.* was drawn in favour of Messrs. Pakeman & Read, the solicitors of David Payne & Co., and was sent to them by the secretary. This cheque was signed by Kolckmann and countersigned by the secretary. On March 4, 1902, the Exploring Land and Minerals Company received from David Payne & Co. the debenture for 6250*l.*, which was dated February 25, 1902. On March 12, 1902, the transaction was reported to a board meeting of the Exploring Land and Minerals Company and ratified.

It appeared from the evidence that substantially the whole of the 6000*l.* was paid to the Johnston companies and to Johnston, but there was no evidence that the directors of the Exploring Land and Minerals Company other than Kolckmann, at the time when they advanced the 6000*l.*, had any knowledge that the money was intended to be so applied.

The two main grounds upon which the liquidator based his case were—(1.) that the borrowing was not authorized by the memorandum and articles of the company, and was absolutely ultra vires independently of the question whether the lending company had notice of the purposes for which the money was to be applied; (2.) that Kolckmann's knowledge ought to be imputed to the lending company.

The application came on for hearing before Buckley J. on February 5, 1904.

Buckmaster, K.C., and *Nepean*, for the liquidator.

Upjohn, K.C., and *Jessel*, for the Exploring Land and Minerals Company.

BUCKLEY J. (after stating the facts). Under these circumstances, am I to say that the Exploring Land and Minerals Company had notice of what Kolckmann knew? I think not. I understand the law to be this: that if a communication be made to an agent which it would be his duty to hand on to his principals, who in this case, of course, were the board of which Kolckmann was but one member, and if the agent has an interest which would lead him not to disclose to his principals the information which he has thus obtained, and in point of fact he does not communicate it, you are not to impute to his principals knowledge by reason of the fact that their agent knew something which it was not his interest to disclose, and which he did not disclose. I think, therefore, I ought not to impute to the Exploring Land and Minerals Company the knowledge which Kolckmann had. That leaves only this matter to be considered. If an act ultra vires the corporation be done, it may be immaterial whether the other party to that act had knowledge or had not knowledge that

C. A. 1904 DAVID PAYNE & CO., LIMITED, *In re.* YOUNG *v.* DAVID PAYNE & CO., LIMITED. Buckley J.

the corporation could not do it, and in that state of things the investigation of knowledge which I have made would become irrelevant. Was the borrowing by David Payne & Co. for the purposes of paying 2000*l.* to Johnston and 4000*l.* to the Johnston companies ultra vires, so that, notwithstanding the absence of knowledge, the thing which they in fact sealed does not bind them? That arises upon a clause in the memorandum of association and one of the articles. The clause in the memorandum is a power to borrow and raise money for the purposes of the company's business, and art. 114 (D) gives power to the directors to borrow or raise or secure any sum or sums of money on the security of the property of the company by the issue of debentures, and so on. What is the effect of clauses of that kind? Suppose under a memorandum such as this a board, after passing proper resolutions, go to their bankers, or to anybody else, and say, "Lend us 10,000*l.*" Is it the duty of the lending company then to say, "I look at your memorandum"—which certainly they are bound to look at—"and I find that you can only raise money for the purposes of your business; I cannot safely lend to you until you shew me you are borrowing for the purposes of your business"? In other words, is it a condition attached to the exercise of the power that the money should be borrowed for the purposes of the business, or is that a matter to be determined as between the shareholders and the directors? In my view, the introduction into any memorandum of association of a power to borrow is, generally speaking, unnecessary. Every trading company has power to borrow for the purposes of its business, and the introduction of this clause is only to express in words what would otherwise be the law. A limitation of the borrowing to borrowing for the purposes of the company's business is necessary, of course. A corporation cannot do anything except for the purposes of its business, borrowing or anything else; everything else is beyond its power, and is ultra vires. So that the words "for the purposes of the company's business" are a mere expression of that which would be involved if there were no such words. If you found a power to borrow which would arise only on the happening of a

particular event, then I think it would lie upon the lender to say, "I cannot lend to you until you can satisfy me that the condition has been complied with"; but where the power is merely a general power to borrow, limited only, as it must be, for the purposes of the company's business, I think the matter is to be treated in this way—that the lender cannot investigate what the borrower is going to do with the money; he cannot look into the affairs of the company and say, "Your purposes do not require it now; this borrowing is unnecessary; you must shew me exactly why you want it," and so on. That is all matter lying between the shareholders and the directors. If this borrowing was made, as it appears to me at present it was made, for a purpose illegitimate so far as the borrowing company was concerned, that may very well be a matter on which rights may arise as between the shareholders and directors of that company. It may have been a wrongful act on the part of the directors. But I do not think that a person who lends to the company is by any words such as these required to investigate whether the money borrowed is borrowed for a proper purpose or an improper purpose. The borrowing being effected, and the money passing to the company, the subsequent application of the money is a matter in which the directors may have acted wrongly; but that does not affect the principal act, which is the borrowing of the money. On general principles, I may point out, it would be perfectly impossible to work such a clause as this in any other way. A corporation, every time it wants to borrow, cannot be called upon by the lender to expose all its affairs, so that the lender can say, "Before I lend you anything I must investigate how you carry on your business, and I must know why you want the money, and how you apply it, and when you do have it I must see you apply it in the right way." It is perfectly impossible to work out such a principle. I think here the power to borrow was a power resting in the directors. It did not lie on the Exploring Land and Minerals Company to say, "We cannot lend anything to you until you say exactly what you are going to do with it when you have got it."

For these reasons it seems to me the Exploring Land and

C. A.
1904
DAVID PAYNE & Co., LIMITED, *In re.*
YOUNG *v.* DAVID PAYNE & Co., LIMITED.
C. A.

Minerals Company, who have paid this money and taken this debenture without notice that the money was going to be applied as it was, are not affected by anything arising in regard to that. I therefore think that they are entitled to hold the debenture for which they paid 6000*l*.

H. C. R.

The liquidator appealed. The appeal came on for hearing on June 17, 1904.

Buckmaster, K.C., and *Nepean*, for the liquidator. (1.) The debenture was not issued to raise money for the purposes of the company, and is therefore invalid whether the lenders had or had not notice of the purposes to which the money was to be applied.

(2.) The lending company had through Kolckmann notice of the purposes for which it was raised: *Mahony* v. *East Holyford Mining Co.* (1)

There was no power to issue debentures for the purpose of paying Johnston's debt, or for the purposes of the other companies.

[ROMER L.J. If a company has power to issue debentures to secure the repayment of money advanced to it, can the fact that the directors intend to apply the money improperly affect the validity of the debenture?]

Yes: *Davis's Case.* (2) There was from the first a bargain to lend the money for an improper purpose. The lending company were bound to look into the memorandum and articles of association of the borrowing company to ascertain that the borrowing powers were not exceeded, and it matters not whether they are exceeded as to amount or in any other particular, e.g., by the money being intended to be applied to an improper purpose: *Chapleo* v. *Brunswick Permanent Building Society.* (3)

The main question is whether the knowledge of Kolckmann can be imputed to the lending company. He was the only person who acted in the matter for that company. If an

(1) (1875) L. R. 7 H. L. 869, 899. (2) L. R. 12 Eq. 516.
(3) (1881) 6 Q. B. D. 696.

agent commits a fraud in the very transaction in which he is acting as agent, the principal is bound. The knowledge of Kolckmann must be imputed to the company.

[VAUGHAN WILLIAMS L.J. This case is very like *In re Marseilles Extension Ry. Co.* (1)]

That case was considered in *In re Hampshire Land Co.* (2) Both those cases are distinguishable from the present. It was Kolckmann's duty to give this company all the information which he had; and where there is a duty on the agent to disclose, disclosure is presumed even though it is not his interest to disclose. It is submitted that Buckley J.'s judgment was wrong in this respect. And, further, it is immaterial whether there was any duty on the agent to disclose at the time when the information was received if a duty arose subsequently: *Bradley* v. *Riches* (3); *Kettlewell* v. *Watson.* (4)

Upjohn, K.C., and *Jessel*, for the Exploring Land and Minerals Company.

VAUGHAN WILLIAMS L.J. I think that the decision of Buckley J. in this case was quite right, and that this appeal must be dismissed. Mr. Nepean has said everything that can be said in the case, and, I should like to add, has said nothing irrelevant, and urged nothing on us which was not useful; at the same time, he has not convinced me. He began with an argument that this transaction was ultra vires altogether—that it was just as if this transaction was a lending to a company with a limited borrowing power in excess of the amount authorized by the power; but he was compelled to abandon that first attack on the judgment of Buckley J., because really in the face of *In re Marseilles Extension Ry. Co.* (1) it was impossible to maintain that proposition. The whole inquiry which was there entered into by the Court as to the knowledge of the lending company would have been absolutely immaterial if this transaction was ultra vires in such a sense that nothing could make it right. That disposes of that contention. Now then, assuming that one has to prove the knowledge of the

(1) (1871) L. R. 7 Ch. 161.
(2) [1896] 2 Ch. 743.
(3) (1878) 9 Ch. D. 189.
(4) (1882) 21 Ch. D. 685.

C. A. 1904 DAVID PAYNE & Co., LIMITED, *In re.* YOUNG *v.* DAVID PAYNE & Co., LIMITED. Vaughan Williams L.J.

lending company here that the money was going to be applied to an improper purpose, how is it sought to prove that? It is attempted to prove it by saying that Kolckmann knew it, that Kolckmann was a director of the lending company, and that he was acting in this matter, and that, as he knew it, it must be taken that the company knew it. Attention is called to the fact that at the moment that Kolckmann became aware, if he ever did become aware, that the money was intended to be applied for purposes outside the memorandum of association, Kolckmann was in fact, though a director of the lending company, yet not purporting to act as such director. But then it is said, "True; but it is not necessary that the agent should have acquired the knowledge at the time when he is acting as agent. It is sufficient if he afterwards acts as agent in respect of the matter as to which he has acquired the knowledge. It then becomes his duty to communicate to the company for which he is then acting the knowledge which he has previously acquired"; and *Bradley* v. *Riches* (1) and *Kettlewell* v. *Watson* (2) were cited in favour of that proposition. I entirely agree; but those cases have no application at all to the present case, because in my opinion, at the moment when Kolckmann began acting on behalf of the company, the transaction was of such a nature that there was no obligation on the part of the lending company to inquire to what purposes the borrowed money was going to be applied, and there was no obligation upon Kolckmann to receive or disclose any such information. I believe I correctly stated the result of *In re Marseilles Extension Ry. Co.* (3) in *In re Hampshire Land Co.* (4) when I said: "It seems to me that, broadly, the Lords Justices do draw the line thus, that the knowledge which has been acquired by the officer of one company will not be imputed to the other company, unless the common officer had some duty imposed upon him to communicate that knowledge to the other company, and had some duty imposed on him by the company which is alleged to be affected by the notice to receive the notice." To my mind the proper inference in this case is that there was no

(1) 9 Ch. D. 189.
(2) 21 Ch. D. 685.
(3) L. R. 7 Ch. 161.
(4) [1896] 2 Ch. 743, 748.

duty on the part of Kolckmann to receive any information on account of his company as to how this money was going to be applied. It was not the duty of his company to make any inquiry on that subject, nor was it the duty of the directors of the company to receive any information. That is the inference which I draw here from the facts. Kolckmann at some meeting, when he was acting in his own interest entirely and not as director, discussed with some people how some money could be raised, and it was then suggested that an application should be made to the Exploring Land and Minerals Company to lend this money upon the security of a debenture of David Payne & Co. The application is made; the matter is introduced to the lending company through the medium of Kolckmann. Under these circumstances the money is lent on the authority of Mr. Bourke, the chairman, Kolckmann actually signing the cheque, and these two acted in this matter without any direct authority of the company. Therefore they acted in an unauthorized manner. But then a fortnight later the matter is brought to the attention of the board, and the lending of the money is ratified. In my opinion it would be altogether wrong to impute to the Exploring Land and Minerals Company the knowledge which came to Kolckmann at the time when the meeting to which I have referred took place. To my mind there is no evidence here to shew that Kolckmann ever professed to act on behalf of the company until he drew this cheque which was to be exchanged for the debenture. It is said that the board ratified Kolckmann's negotiation. I think they only ratified it so far as he was professing to act on behalf of the company. Under these circumstances I see no ground on the facts for imputing Kolckmann's knowledge to the company. I therefore think that this debenture is a good security in the hands of the lending company.

I wish to make one observation about *Davis's Case*. (1) The report is not very precise; but if that case is really an authority for the proposition that the application of money borrowed within the borrowing powers of the company for purposes not authorized by the memorandum of association makes the

(1) L. R. 12 Eq. 516.

C. A. 1904 DAVID PAYNE & CO., LIMITED, *In re.* YOUNG *v.* DAVID PAYNE & CO., LIMITED.

transaction invalid, and the security given to the lender a nullity, merely because there was an intention on the part of the borrowing company to apply the money for an improper purpose, although the lending company might have had no knowledge whatever that the money was to be applied for that improper purpose, I think that *Davis's Case* (1) is wrong and cannot be reconciled with subsequent authorities.

ROMER L.J. I have come to the same conclusion. In the first place, where you have a limited company with a memorandum of association authorizing the company to embark on a series of transactions, if among those purposes you find a power to borrow generally for the purposes of the company, I take it to be clear beyond controversy at the present day that, when money is being borrowed within the limits of the power of borrowing as to amount, the person who lends the money is not bound to inquire to what purpose the borrowing company is about to apply the money so borrowed; and if *Davis's Case* (1) is an authority to the contrary, I cannot agree with it. The only other question is as to imputed notice. I take it that there was a transaction between the Exploring Land and Minerals Company and David Payne & Co. of this kind. The first company lent 6000*l.* secured by a debenture of the second company. Now that transaction was intra vires the second company. But there was some evidence to shew that it was intended by some of the directors of the second company to apply the money for purposes not authorized and altogether improper quâ the second company. Now, one director of the first company knew how that money was going to be applied. He acquired that knowledge through some conversation which he had with some people in his private capacity before that transaction was carried out by the lending company. The question is whether, inasmuch as that director took part on behalf of his company in authorizing the lending of the money and the acquisition of the debenture and assisted in carrying out that transaction, the knowledge of that director so acquired is to be considered the knowledge of the lending company.

(1) L. R. 12 Eq. 516.

Is that knowledge as a matter of law to be imputed to the lending company? In my opinion no such notice can be imputed at law. I take it that in such a transaction the lending company was not bound to inquire as to the application of the money at all by the borrowing company. That being so, it appears to me that knowledge independently acquired by a director in his personal capacity in respect to a matter which was irrelevant so far as concerned the lending company is knowledge which cannot be imputed to the company, for it was knowledge of something which really did not concern the lending company as a matter of law. Therefore, you cannot imply a duty on the part of the director to have told these facts to the lending company, or a duty on the part of the lending company to have inquired into that question. The lending company not having any reason to know how the money was to be applied apart from the knowledge of the director, it would have been wholly improper for the agent of that company to have inquired into the question of the application of the money. That being so, there was no legal duty on the director to impart his knowledge, nor any duty on the part of the company to have acquired the knowledge. Apart from the knowledge of the director, no knowledge in fact was proved against the lending company. I therefore think that the appeal fails.

COZENS-HARDY L.J. I am of the same opinion. There is one point, as to whether a person lending money to a company is in danger of losing his security if the company intended to devote the money to improper purposes, as to which I should like to add a few words. I do not think the point can be put better than it has been by Buckley J. He says: "Where the power is merely a general power to borrow, limited only, as it must be, for the purposes of the company's business, I think the matter is to be treated in this way, that the lender cannot investigate what the borrower is going to do with the money; he cannot look into the affairs of the company and say, 'Your purposes do not require it now; this borrowing is unnecessary; you must shew me exactly why you want it.'"

C. A.
1904
DAVID PAYNE & Co., LIMITED, *In re.*
YOUNG *v.* DAVID PAYNE & Co., LIMITED.
Cozens-Hardy L.J.

That statement of the law being entirely consistent with recent authorities, it seems to me to follow that *Davis's Case* (1) cannot be relied on as laying down any principle of law upon which we ought to act. There may have been some circumstances which would justify the decision not to be found in the report, but otherwise I am of opinion that that decision is wrong. As to imputed notice, the ground has been so completely covered by Romer L.J. and by *In re Marseilles Extension Ry. Co.* (2) and *In re Hampshire Land Co.* (3) that I do not think that I should be doing any useful service by adding anything. I will only say that if I took a different view of the law I should hesitate to place complete reliance on Mr. Johnston's evidence.

Solicitors: *Blundell, Gordon & Co.; Willis & Willis.*

(1) L. R. 12 Eq. 516. (2) L. R. 7 Ch. 161.
(3) [1896] 2 Ch. 743, 748.

H. B. H.

ATTORNEY-GENERAL *v.* ASHTON GAS COMPANY.

C. A.
1904
BUCKLEY J.
Jan. 26.
C. A.
June 22.

[1903 A. 1246.]

Revenue—Income Tax—Gas Company—Standard Rate of Dividend—Payment of Dividend free of Income Tax—Income Tax Act, 1842 (5 & 6 *Vict. c.* 35), *ss.* 40, 54, 60, *Sched. A, No. III., rule* 3.

Where by the special Act of a gas company it was provided that the profits divisible in any year amongst the ordinary shareholders should not exceed a given rate:—

Held, that in calculating the rate of dividend income tax ought to be included.

THIS was an action by the Attorney-General at the relation of the corporation of Ashton-under-Lyne, and by the corporation, against the Ashton Gas Company, for a declaration that according to the true construction of the Ashton Gas Acts, 1847 and 1877, the profits divisible in any year among the shareholders of the company ought to be calculated as inclusive and not exclusive of the amount payable in that year in respect of income tax on the profits proposed to be divided, and for an injunction to restrain the company from distributing its profits otherwise than upon the footing of that declaration. The Ashton Gas Company (hereinafter called the company) was incorporated by the Ashton Gas Act, 1847 (10 & 11 Vict. c. cci.), for the purpose of supplying gas to the town of Ashton-under-Lyne and the neighbourhood. The company was regulated by the provisions of the Ashton Gas Act, 1847, as amended by the Ashton Gas Act, 1877 (40 & 41 Vict. c. clxxxvi.), and had a share capital of 57,630*l.*, divided into 1921 fully paid shares of 30*l.* each.

Sects. 16 and 17 of the Ashton Gas Act, 1877, were as follows:—

"16. Except as in this Act provided, the profits of the company to be divided among the shareholders in any year shall not exceed the rate of ten pounds per centum per annum (which rate is in this Act referred to as 'the standard rate of

C. A. 1904

ATTORNEY-GENERAL v. ASHTON GAS COMPANY.

dividend') on the ordinary share capital or stock of the company authorized by Parliament and paid up.

"17. The standard price to be charged by the company for gas supplied by them shall be three shillings and eight pence per thousand cubic feet: Provided that the company may increase or diminish such standard price subject to a decrease or increase in the standard rate of dividend as defined by this Act, to be calculated as follows:—

"For every penny charged in excess or in diminution of such standard price in any year, the standard rate of dividend shall for such year be reduced or increased by five shillings in the hundred pounds per annum."

The company had for several years paid higher dividends than the standard rate of 10 per cent., and had made reductions in the price of gas proportionate to the increase of dividends, but in calculating the dividends the company had made no deduction in respect of income tax, but had paid the dividends to the shareholders in full.

It was the practice of the company when paying dividends to the shareholders to attach to the dividend warrant a certificate of payment of income tax for the use of shareholders who might be entitled to a return of income tax by the Government. This certificate, which was signed by the secretary, was as follows:—

"I hereby certify that income tax on the profits of the company of which this dividend forms part has been or will be duly paid by me to the proper officer for the receipt of taxes."

The corporation, who were large consumers of the company's gas and as such interested with other consumers in the price of gas in the borough being reduced, complained that the company in paying the maximum rate of dividend to the shareholders without deducting income tax was in effect paying to the shareholders a larger dividend than was authorized by the Act of 1877.

The company by its defence alleged that it was bound by the Income Tax Act, 1842, to pay income tax on its annual profits as a whole before and irrespective of the payment of any dividend to its shareholders, and contended that upon the

true construction of its special Acts the profits divisible for any year amongst its shareholders were properly calculated as exclusive of the amount payable for that year in respect of income tax on the annual profits.

The action was heard before Buckley J. on January 26, 1904.

Danckwerts, *K.C.*, and *R. J. Parker*, for the plaintiffs.
H. Terrell, *K.C.*, and *W. M. Cann*, for the defendants.

BUCKLEY J. By ss. 16 and 17 of their special Act of 1877 the defendant company are precluded from paying dividend in excess of a certain rate fixed by a sliding scale dependent upon the price charged for gas. Their practice has been, and is, to pay dividend at the maximum rate thus fixed, but free of income tax. The whole question in the case is whether this is a payment in excess of that allowed by the Act. The point is the simplest possible, and, but for the fact that some provisions of the Income Tax Acts have to be considered, and that these Acts are not always easy of construction, I should have thought it incapable of the amount of argument which it has received. The obvious solution seems to be that when the company pays, say, 10 per cent., free of income tax, it gives the shareholder 10 per cent., and relieves him from liability to make any payment to the Revenue or allowance to the company out of it. In other words, he receives 10 per cent., and an indemnity against a liability to pay part of it to the Revenue, or allow a deduction by the company of such part as the company has paid to the Revenue for income tax. He thus gets more than a 10 per cent. dividend. Further, if he be a person of limited income entitled to remission or abatement of income tax, he will in fact receive 10 per cent. and the income tax, or so much of the income tax as he reclaims from the Revenue authorities. The argument addressed to me has been that, inasmuch as under the machinery of the Income Tax Acts the corporation is assessed under Sched. A, and pays income tax upon all its profits, the corporator has nothing out of which it can pay the corporation dividend beyond the balance which remains after the corporation has paid the income tax payable

C. A. 1904 ATTORNEY-GENERAL v. ASHTON GAS COMPANY. Buckley J.

by the corporation; and that out of this fund it is entitled to give the shareholder not exceeding, say, 10 per cent. This argument, I think, rests upon a fallacy. The profits are not arrived at after deducting income tax. The income tax is part of the profits—namely, such part as the Revenue is entitled to take out of the profits. A sum which is an expense which must be borne whether profits are earned or not, may no doubt be deducted before arriving at profit. But a proportionate part of the profits payable to the Revenue is not a deduction before arriving at, but a part of, the profits themselves. I refer to Lord Blackburn's judgment in *Last* v. *London Assurance Corporation*. (1) Under the Income Tax Acts all income has to pay the tax, but not to pay it twice over. If it has already been paid under Sched. A, it is not payable again under Sched. D. But that does not prove that the person who receives a distributive share of the fund does not bear income tax in respect of his ownership of shares in the company. The Act provides that he shall. The relevant machinery is that under s. 40 of the Income Tax Act, 1842 the company is chargeable, and its officer has to do the necessary acts and make the necessary returns on its behalf. By s. 54 he is to prepare a statement of the profits, and the estimate is to be made on the amount of the profits before any dividend shall have been made thereof to the member, and the member is to allow out of such dividend a proportionate deduction in respect of the duty so charged. The words which here command attention are that the member is to allow the duty out of the dividend. This particular company is governed by s. 60, Sched. A, No. III., rule 3, of the Act of 1842. That section goes on to repeat or reproduce, but not very accurately, some part of the matter which had already been dealt with by s. 54, and the words as to the allowance of the proportionate deduction of the duty are not identical with the words of s. 54. For the words in s. 54, "all such other persons and corporations or companies," s. 60 substitutes the words "all such persons, corporations, companies, and societies," and for the words "out of such dividends" substitutes the words "out of

(1) (1885) 10 App. Cas. 438, 445.

such produce or value." An argument has been based upon this, the object of which is to shew that the persons who are to make the allowance under s. 60 are not the members of the corporation, but the corporation itself, and that the words are intended to provide that the corporation shall make the allowance to its treasurer. This may be so, but I do not think it is. It is true that the draftsman has used a collection of nouns substantive which reproduce those used in the earlier part of the clause with reference to the corporation whose profits are being considered and not the collection of nouns substantive previously used as describing the members to whom distributive shares are to be paid. But, as matter of construction, I think the person to allow under s. 60 is the same person as he who is to allow under s. 54—namely, the member. But the question is not, I think, vital, for, even if the suggested construction of s. 60 be right, the liability of the members to make the allowance would still, as it seems to me, be enforced by s. 54. I refer also to s. 102 of the Act of 1842, and s. 40 of the Act of 1853. When this company declared and paid a dividend of 10 per cent., the member would be bound to allow the corporation to deduct the income tax upon his dividend, and he would receive a net sum of less than 10 per cent. When the corporation declared and paid a dividend of 10 per cent., free of income tax, the member received a sum larger by the amount of the income tax, which is not then to be deducted. The whole question is, Are the profits thus divided among the shareholders in excess of 10 per cent. on the capital? I think they are. It is exactly as if the company declared a dividend of 10 per cent., and the amount of the income tax, so that when the statutory deduction of the income tax is made the shareholder shall have a clear 10 per cent. In my judgment the plaintiffs are right.

F. E.

C. A.

The defendants appealed. The appeal was heard on June 22, 1904.

Haldane, K.C., and *W. M. Cann* (*H. Terrell, K.C.*, with them), for the defendants. The income tax payable by this

C. A. 1904 ATTORNEY-GENERAL v. ASHTON GAS COMPANY.

company, being a gas company, is payable under s. 60 of the Income Tax Act, 1842, Sched. A, No. III., rule 3, which forms a separate code, and this case is outside Sched. D altogether. The persons enumerated in this provision as the persons who are to allow the deduction to be made in respect of income tax are not the same as the persons enumerated in s. 54, and include persons who are not members of the company, namely, creditors. The tax is charged upon the profits of the gas company; it is a charge on the profits before the time comes for distribution among the shareholders, and, the State having taken a part of the profits, the company is free to divide the balance up to the maximum rate allowed by the special Act of 1877 among the shareholders. The profits spoken of in s. 16 of that Act as divisible amongst the shareholders are profits after paying all charges, and one of those charges is the income tax. The tax is charged upon the company by s. 40 and by s. 60, No. III., rule 3, and nothing is said about the members. The company itself pays the income tax: *Gilbertson* v. *Fergusson*. (1)

[ROMER L.J. Why does not s. 54 govern all companies?]

Because this class of companies is separately dealt with by s. 60.

Further, under s. 54 there is no obligation to deduct the income tax from the dividends; the deduction is purely optional: *London County Council* v. *Attorney-General*. (2)

Danckwerts, K.C., and *R. J. Parker*, for the plaintiffs.

VAUGHAN WILLIAMS L.J. I think the judgment of Buckley J. is quite right. The matter depends, as Buckley J. points out, upon ss. 16 and 17 of the Ashton Gas Act, 1877. [His Lordship read the sections.]

The whole question which we have to determine in this case is whether in estimating what has been paid as the standard rate of dividend one has to include the income tax which has been paid by the company as part of that which goes to make up the 10 per cent. standard rate of dividend. It really was not denied in argument for one moment that that which has to be divided amongst the shareholders is the profits of the

(1) (1881) 7 Q. B. D. 562. (2) [1901] A. C. 26.

company, and it is not denied that the income tax is part of the profits of the company, and not something to be deducted before you arrive at the profits. Buckley J. puts that so plainly that I cannot add anything to it. He says this: "A sum which is an expense which must be borne whether profits are earned or not, may no doubt be deducted before arriving at profit. But a proportionate part of the profits payable to the Revenue is not a deduction before arriving at, but a part of, the profits themselves." Then he refers to Lord Blackburn's speech in *Last* v. *London Assurance Corporation*. (1) No doubt it is quite true to say that if you have regard to the provisions of the Finance Act with reference to income tax under Sched. D, the income tax in a case like this is assessed on the profits of the company; but still the fact that that is so, and that that is the mode of collection of the income tax, in no way negatives the proposition that the company is paying the income tax on behalf of the shareholders amongst whom the profits, as I have pointed out, after payment of income tax, are distributed.

There have been one or two suggestions made against this conclusion. Buckley J. had pointed out that not only was there nothing outside the provisions of the Act preventing the company in such a case from deducting the rateable proportion of the income tax from the dividend paid to each shareholder, but he goes on to say that s. 54 of the Act of 1842 makes a positive provision to that effect. I did not understand either of the appellants' counsel to deny that if you take s. 54 by itself there is not included amongst the persons who are to allow this deduction members who are receiving the dividend; and Buckley J. goes on, after pointing out that that is so, to deal with the provisions of s. 60, the third clause of which was much relied upon by Mr. Haldane, and he comes to the conclusion that there is nothing in that third clause which is inconsistent with the application of s. 54. The thing that was relied upon by Mr. Haldane as entitling him to deal with s. 60 as if it created a special code distinct from the provisions in s. 54 was that in the enumeration of

(1) 10 App. Cas. 438, 445.

C. A.
1904
ATTORNEY-GENERAL
v.
ASHTON GAS COMPANY.
Vaughan Williams L.J.

the persons who were to allow the deduction there were persons who had no interest in the profits of the company whatsoever, or persons who might have no interest, that is to say, creditors, and that you do not find in that section the words which you find in s. 54, which are—"persons, corporations, or companies having any share, right, or title in or to such profits or gains." But Buckley J. came to the conclusion, and I agree with him, that there is nothing in s. 60, No. III., which is inconsistent with the application of s. 54 to the present case. Mr. Haldane called the two sections, 54 and 60, both of them, indemnity sections. I do not think that s. 54 is an indemnity section in the same sense that s. 60 is. I think that it does apply to the present case, and that the shareholders are bound by it to allow this deduction; and it necessarily follows from that that the income tax which is paid by the company is income tax paid on behalf of the shareholders. But even if this were not so, and one did not rest upon s. 54 as shewing conclusively that the income tax is paid by the company on behalf of the shareholders, and did not rely even on the practice of the company as shewn by the income tax certificate which has been put in evidence, it still remains that there is nothing in the Act of Parliament which prohibits the company from treating the amount which they paid on account of income tax as paid on behalf of the shareholders.

Under those circumstances, it seems to me that by the general rule of law one ought so to treat these payments. The dividends are dividends out of the profits, the sums paid for income tax are part of those profits, and it seems to me, therefore, that, apart from any special provision in the special Act, and apart from any practice which may have existed, if this came up as a new question immediately after the Act of Parliament had been passed, one would equally have been justified in coming to the conclusion that the income tax was paid on behalf of the shareholders out of the profits. Under those circumstances, I think that if the dividend is paid up to the full standard rate of 10 per cent. free of income tax, the shareholders would be receiving more than the standard rate.

I think, therefore, that this appeal fails, and ought to be dismissed with costs.

ROMER L.J. I agree with what my Lord has said, and with the judgment of Buckley J., and will only add a very few words. I must say, speaking for myself, that the case appears to me to be a reasonably clear one on principle. If such a company as we have to deal with pays income tax on its profits, the income tax, as has been pointed out, is payable out of the profits, and is part of the profits; and if the profits, after deducting the income tax, have subsequently to be distributed amongst the members of the company, that income tax is not payable again by those members so far as they receive their share of the profits, because the income tax is to be taken as having been paid out of their profits, and on their behalf. If, for example, a company such as this had preference shareholders as well as ordinary shareholders, and the preference shareholders were only entitled to receive out of the profits a fixed sum, say 5 per cent., then, when income tax is paid by the company out of its profits, the company must be treated in respect of so much of the profits as is going to the preference shareholders as having paid their income tax in respect of their 5 per cent. Accordingly, to my mind, it is clear on principle in such a case that there ought to be deducted from the dividend warrants payable to the preference shareholders the income tax on the 5 per cent. which had been previously paid on their behalf by the company. The same principle, of course, applies to the shareholders in the present case who are restricted by the provision of the Act, so that they are only to share a limited amount of the profits. Sect. 16 of the special Act in this case makes perfectly clear what I should otherwise have gathered even without that section—that after all what the members of the company in respect of their maximum dividend are to receive is clearly so much of the profits of the company. Sect. 16 says that the profits of the company to be divided amongst the shareholders in any year shall not exceed a rate of 10 per cent. per annum, and so forth. That shews that what the shareholders have to receive is,

C. A. 1904 ATTORNEY-GENERAL v. ASHTON GAS COMPANY. Romer L.J.

in any point of view, profits. Out of those profits income tax would have been payable directly by the shareholders themselves if it had not been paid by the company. As a matter of fact it has been paid by the company, and, therefore, in that respect the shareholders are free from the obligation of paying the income tax, because they have already received a portion of their profits by reason of the payment of the income tax in respect of those profits by the company generally. It appears to me that that simple view really decides this question, and I am clearly of opinion that the appeal entirely fails.

COZENS-HARDY L.J. I am of the same opinion. I so entirely agree with every word of the judgment of Buckley J., as well as with what has fallen from my Lord and Romer L.J., that I do not think I ought to add anything more on my own behalf.

Solicitors: *Sharpe, Parker, Pritchards, Barham & Lawford, for F. W. Bromley, Town Clerk, Ashton-under-Lyne; Burgess, Cosens & Co., for Arthur Buckley, Manchester.*

H. B. H.

TAIT *v.* MacLEAY.

[1902 T. 957.]

C. A. 1904 July 21, 26.

Company—Prospectus — Non-disclosure of Contracts—Director's Liability — "Knowingly issuing"—Plea of Ignorance—Companies Act, 1867 (30 & 31 *Vict. c.* 131), *s.* 38.

A director issued a prospectus which omitted to disclose a contract in accordance with the requirements of s. 38 of the Companies Act, 1867; but at the meeting of directors at which the prospectus was approved he forgot the existence of the contract in question, although the minutes of the previous meeting, at which this contract was considered, were read and confirmed in his presence, and although he had himself approved the contract. He had, however, a general knowledge of the existence of contracts which might fall within the section, and he made no inquiry into these contracts, but relied upon the assurance of the company's solicitor that the prospectus disclosed all contracts which the section required to be disclosed:—

Held, that he "knowingly issued" the prospectus within the meaning of s. 38.

Decision of Kekewich J. affirmed.

The definition of "knowingly issuing" given by Cockburn C.J. in *Twycross* v. *Grant*, (1877) 2 C. P. D. 542, considered.

Per Romer L.J.: The first part of s. 38 of the Companies Act, 1867, imposes upon a director who is settling and issuing a prospectus the duty of inquiring what contracts there are in existence which ought to be set out in the prospectus; and if a director knows generally that there are contracts in existence which may or may not fall within the section, but does not inquire into those contracts, so that he can truthfully say that he had no knowledge of any contracts in particular which ought to be set forth in the prospectus, he cannot excuse himself from liability under the section on the plea of ignorance, if it afterwards turns out that some of the contracts of which he had a general knowledge were contracts which ought to have been set out, and which he would have ascertained if he had made proper inquiries.

THIS was an appeal from a decision of Kekewich J.

The action was brought by a shareholder in the Standard Exploration Company, Limited, against a director for damages for misrepresentations in the prospectus, and for the non-disclosure therein of certain contracts.

The Standard Exploration Company was promoted by the London and Globe Finance Corporation under the auspices of Mr. Whitaker Wright, and one of its objects was to acquire for

C. A. 1904 TAIT v. MACLEAY.

the purposes of amalgamation the undertakings of a large number of mining companies.

The defendant was one of the first directors of the Standard Exploration Company, and he was also the chairman of certain of the companies which were to be taken over, and he took an active part in the amalgamation proceedings.

The matters complained of in this action were the same as in the actions of *McConnel* v. *Wright* (1), *Trechmann* v. *Calthorpe* (2), and *De la Cour* v. *Clinton* (2), which were brought upon the same prospectus by other shareholders against other directors of the same company, and the evidence generally in the two latter cases was the same as in the present case, and was by consent treated as if it had been given in the present case. Of the contracts the omission of which was complained of the most important was an agreement dated October 27, 1898, made between the London and Globe Finance Corporation and the company, whereby the corporation agreed to transfer to the company 5000 deferred shares held by the said corporation in the Austin Friars Finance Syndicate, and the company agreed to allot to the corporation 40,000 shares in the company in exchange therefor. In the two actions of *Trechmann* v. *Calthorpe* (2) and *De la Cour* v. *Clinton* (2), which were heard together, Joyce J. came to the conclusion, mainly in deference to the decision of the Court of Appeal in *McConnel* v. *Wright* (1), that one of the misrepresentations complained of was established; but he held that the defendants were excused from liability under the Directors Liability Act, 1890, upon the ground that they believed, and had reasonable ground for believing, that the statement in question was true. With regard to the Austin Friars contract, the learned judge, again in deference to the decision of the Court of Appeal, came to the conclusion that this was a contract material to be known, and that there was sufficient evidence of damage to warrant the Court in granting an inquiry; but he stayed the inquiry for a month with a view to an appeal, and reserved all costs until further consideration.

The only material distinction between this action and the

(1) [1903] 1 Ch. 546. (2) (1904) 20 Times L. R. 420.

two actions before Joyce J. was that the defendant, after denying that the contracts mentioned in the statement of claim were material to be known by intending shareholders, pleaded that "in any case he did not knowingly issue a prospectus not disclosing such contracts." Of these contracts the only contract which need be further referred to is the Austin Friars contract, since the Court of Appeal came to the conclusion on the evidence that the plaintiff's case failed as to the other contracts. With regard to the Austin Friars contract, the defence set up by the defendant was that at the time when the prospectus was approved he had completely forgotten its existence. The defendant admitted that he was present at a board meeting held on October 26, 1898, when the contract was approved, and that he actually signed the contract; that he was also present at a board meeting held on October 27, 1898, when the company's solicitor reported that the contract with reference to the 40,000 fully paid shares had been duly filed at Somerset House, and that such shares could be allotted, and the shares were allotted accordingly to the London and Globe Finance Corporation; and that he was also present at the meeting of May 12, 1899, at which the prospectus was approved, and that the minutes of the meeting of October 27 were read and confirmed at that meeting. The defendant, however, stated in his evidence that he paid no attention to the reading of these minutes, and that this particular contract had escaped his memory; and, further, that even if the fact of the purchase of the deferred shares had been known by him, he did not think it would have made any difference. He also said that he and Mr. Spensley, a co-director with whom he had agreed to act in concert in ascertaining the truth of the prospectus, had (at the meeting of May 12) asked Mr. Simmons, the solicitor to the company, whether all the contracts which were proper to be set out in the prospectus had been set out, and that the answer was "Yes," and that he, the defendant, was satisfied with that assurance.

Kekewich J. found that the plaintiff had taken shares in the company on the faith of the prospectus and had suffered damage thereby; that certain of the statements complained of

C. A. 1904 TAIT v. MACLEAY.

in the prospectus were false; and that the defendant, though he had acted honestly, had no reasonable ground for believing those statements to be true. His Lordship also held that the Austin Friars contract ought to have been disclosed. But, he continued, with regard to that contract the defendant pleaded that he did not knowingly issue the prospectus, which admittedly meant knowing of the contract which ought to have been disclosed. The defendant alleged that he had entirely forgotten the existence of that contract; that it was not present to his mind on May 12 when he approved this prospectus; and that, therefore, he could not be said to have issued this prospectus knowing of this contract. In his Lordship's opinion, it might well be that a total forgetfulness even within a very short time was, under some circumstances, equivalent to total ignorance. He was not prepared to say that that was a plea which was impossible in law; but it must be regarded with reference to all the facts. This contract had been approved on behalf of the Standard Company at a meeting of directors at which the defendant was present. Moreover, at the meeting of May 12 the minutes of the last meeting, which contained a reference to this contract, were read and signed, and, though it was quite possible that the defendant did not attend to what, in his Lordship's opinion, was an extremely important part of the meeting, he could not be heard to say that he sat there and did not hear the reference to this document, and that, therefore, he had forgotten it. It seemed to his Lordship that, whatever it might be right to say under other circumstances in a different case altogether with respect to ignorance and forgetfulness being equivalent, it was impossible to allow that plea in a case like this, where the forgetfulness was really due to the man's own neglect. His Lordship accordingly held that the defendant knowingly omitted to state this contract in the prospectus; and he gave judgment for the plaintiff both as to the misrepresentations and as to the omission of contracts in the prospectus, and ordered the defendant to pay the costs of the action.

The defendant appealed. The appeal came on for hearing on July 21, immediately after the appeals in *Trechmann* v.

Calthorpe (1) and *De la Cour* v. *Clinton* (1) had been heard, and the Court postponed giving their judgment in those appeals until after the hearing of this appeal.

Gore-Browne, K.C., and *Ashton Cross*, for the defendant. Sect. 38 of the Act of 1867 speaks of "knowingly issuing" the prospectus, and that has been construed as issuing the prospectus knowing of the existence of the contract which is omitted. The Act adds intentional omission to the common law liability for wilful misrepresentation: *Twycross* v. *Grant*. (2) The defendant cannot be said to know of the existence of a contract if he has forgotten all about it; and the fact that his want of knowledge may have been due to negligence will not make him liable under this section. The word "knowingly" was intended to protect persons in the position of the defendant who have omitted contracts which they have honestly forgotten.

[VAUGHAN WILLIAMS L.J. referred to *Watts* v. *Bucknall* (3) and *In re Gomersall*. (4)]

Where a statute imposes a duty, disobedience to its provisions is a misdemeanour; and this defendant might have been proceeded against either criminally or civilly for "knowingly issuing." This is analogous to cases where the offence consists in "knowingly and wilfully" doing or omitting something. In such cases the question of "knowingly and wilfully" is a question of fact for the jury; and if in this case criminal proceedings had been taken, no jury would have found that the defendant knew of something the existence of which he had forgotten.

Hughes, K.C., and *W. Higgins*, for the plaintiff. Assuming that this defendant had forgotten the contract, he is liable on the principle stated by Byrne J. in *Watts* v. *Bucknall* (5), since he has not taken the trouble to make inquiries.

Gore-Browne, K.C., in reply.

Cur. adv. vult.

(1) 20 Times L. R. 706.
(2) 2 C. P. D. 469, 542.
(3) [1902] 2 Ch. 628; affirmed [1903] 1 Ch. 766.
(4) (1875) 1 Ch. D. 137; affirmed sub nom. *Jones* v. *Gordon*, (1877) 2 App. Cas. 616.
(5) [1902] 2 Ch. 633.

C. A. 1904 TAIT v. MACLEAY.

July 26. Their Lordships, after giving judgment in *Trechmann* v. *Calthorpe* (1) and *De la Cour* v. *Clinton* (1), affirming the judgment of Joyce J., proceeded to give judgment in this appeal.

VAUGHAN WILLIAMS L.J. This case has been argued before us on both sides on the basis that it differs from the two cases in which we have delivered judgment only in this—that the defendant in this action sets up a defence which was not set up by the defendants in the other actions.

The evidence generally taken in the two first-mentioned actions was taken by consent as if given in this action; and therefore all we have to do in this action is to consider the nature of this additional defence, and the evidence given by the defendant in support of it. The defendant pleads (inter alia) in his amended defence that, "In any case he did not knowingly issue a prospectus not disclosing such contracts," namely, the contracts mentioned in the statement of claim; and in the argument the contract of October 27, 1898, was treated as the only contract to which the Court need address its attention. [His Lordship referred to the defendant's evidence, and continued:—]

Now it is common ground in this case that Mr. MacLeay is to be considered as a witness of truth, and that his statements are to be accepted as far as they go as true in fact. But what is the substance of his evidence? I do not think that it comes to more than this—that the particular contract of October 27, 1898, was not present to his mind on May 12, 1899. He nowhere states that it was not generally present to his mind that there had been a purchase by the Standard Company from the London and Globe, or even that it was not present to his mind that there had been a contract of some sort between the Standard Company and the London and Globe in respect of the Austin Friars Syndicate. Moreover, Mr. MacLeay makes it clear that he contemplated that there might be some contracts which might not be inserted because the solicitor did not consider the contract as necessary or material. Such being

(1) 20 Times L. R. 706.

the general knowledge of Mr. MacLeay, I am not prepared to hold that because he had not present to his mind the particular contract of October 27, 1898, he had not present to his mind generally that there was some contract between the Standard and the London and Globe as to the Austin Friars Syndicate and its property or shares. Nor am I prepared to hold that he was not content that such contract should be omitted if the solicitor was of opinion that as a matter of law it was not so material a contract as to necessitate its insertion in compliance with the 38th section of the Act of 1867.

I therefore come to the conclusion that the prospectus was knowingly issued by Mr. MacLeay with a general knowledge of the existence of contracts within the section, and that he was content that such contracts should be omitted if the solicitor thought for any reason that it was not necessary to insert them or refer to them in the prospectus, and that the case is brought within the definition of Cockburn C.J. in *Twycross* v. *Grant* (1) of "knowingly issuing," which runs thus: "'Knowingly issuing' means neither more nor less than issuing with a knowledge of the existence of contracts within the section, and the intentional omission of them from the prospectus." It is not necessary that there should be a conscious fraud on the part of the defendant to render him liable to be sued under the provisions of s. 38 of the Act of 1867. Omission because the defendant was advised that a particular contract did not require, as a matter of law, to be specified will not afford ground of defence. This is *Twycross* v. *Grant*. (1) Neither will omission left to the discretion of the solicitor.

I have felt it necessary to express my opinion upon this additional defence which is raised by Mr. MacLeay, but as a matter of course the judgment given in the other cases applies against him. The only question is whether he can escape from the effect of this judgment on the ground of his having forgotten this contract of October 27, 1898. My judgment is that he cannot, and therefore the appeal must be dismissed, and in effect the judgment delivered in the other case will also be judgment in this case.

(1) 2 C. P. D. 542.

C. A. 1904 TAIT v. MACLEAY.

ROMER L.J. This case is governed by our former decision, except as to one further point raised on behalf of the defendant. That point depends upon this. He says that at the time when the prospectus was settled and agreed to by him on May 12, 1899, and first issued, he did not remember the contract of October 27, 1898. Now with reference to that point I should like to make a few observations about the general effect of s. 38. That section is divided into two parts, and the earlier part says that "every prospectus of a company, and every notice inviting persons to subscribe for shares in any joint stock company, shall specify" the particulars of the contracts there mentioned. These contracts are very numerous as stated. Now with regard to that part of s. 38, noticing its imperative terms, I think it follows from it that a director who is settling and issuing a prospectus has a duty cast upon him to see that the provisions of this section are complied with—a duty, at any rate, to take reasonable care to comply with the section. When one comes to the second part of the section it is very general indeed, so far as the mere wording is concerned, for it says that "any prospectus or notice not specifying the same," i.e., the dates and the names of the parties to the contracts above referred to, "shall be deemed fraudulent on the part of the promoters, directors and officers of the company knowingly issuing the same, as regards any person taking shares in the company on the faith of such prospectus, unless he shall have had notice of such contract."

Now it will be observed that the second part of s. 38 only speaks of "knowingly issuing the same"—that is to say, knowingly issuing a prospectus; so that so far as the wording is concerned the effect of that section might be very wide and far-reaching indeed if no limitation were put upon it, for a man who issues a prospectus, of course, knowingly issues it in one sense, and, if the mere wording of the section were looked at, it would follow that if the prospectus, as issued and knowingly issued, did not comply with the earlier part of the section, then it would be deemed fraudulent against the officer issuing it.

But it was soon apparent to the Courts that the very large

wording of the latter part of the section ought to receive some narrowing in order that justice might be done. Take a typical example to shew this. Take the case of a director who really does his duty and tries to comply with s. 38. Take it that he inquires into what contracts there are which might fall within s. 38, and properly discharges his duty in seeking to ascertain which of those contracts ought to be set forth. But suppose that, having done his duty in that respect, the result is that he is not informed of and does not ascertain the existence of a particular contract. It could not be that the Legislature intended that he should be made liable merely because the prospectus did not set forth that particular contract under the circumstances indicated. Now I think that it was a consideration of cases like that which I have just mentioned which made the judges in some cases, and particularly Cockburn C.J. in *Twycross* v. *Grant* (1), state that "knowingly issuing" in s. 38 means issuing with a knowledge of the existence of contracts within the section and intentional omission of them from the prospectus. But those statements must be taken with reference to the facts of the particular cases which the judges who made those statements were considering, and I do not think that those statements are to be taken as giving a complete interpretation of the section applicable to all possible cases. Take, for example, the following case to shew what I mean. Suppose that a director knows generally that there are contracts in existence which have been entered into by the company, and which may or may not fall within s. 38, but does not choose in the discharge of his duty under the earlier part of the section to inquire into those contracts at all, so that he may truthfully say that he had no knowledge of any contracts in particular which ought to be set forth in the prospectus, would that absence of inquiry and consequent ignorance excuse him from liability under s. 38 if it turned out that some of the contracts of which he had a general knowledge were contracts which ought to have been set out, and which he would have ascertained if he had taken the trouble to make proper inquiries and to

(1) 2 C. P. D. 469, 542.

C. A. 1904 TAIT v. MACLEAY. Romer L.J.

discharge his duty under s. 38? In my opinion, he would not be so excused. I think that, after such a neglect of his duty to endeavour to comply with the earlier part of the section, he could not say that he had no knowledge of the existence of the contracts in question which were not set out so as to hold him free from liability under the section.

Those general considerations bring me now to consider the circumstances and evidence in the present case. Now, it is clear that the defendant knew there were contracts made by the company which it might be material to set forth in order to comply with s. 38. What did he do under those circumstances? The conclusion which I have come to upon the evidence is that in substance he made no inquiry as to what those contracts really were. He left it to the solicitor of the company to say which of the contracts in question were material to be set forth, and to see them sufficiently and properly set forth in the prospectus. He really took no other trouble in reference to s. 38. It is to be noticed that when he attended the meeting of May 12, when the prospectus was considered, he had not previously made any inquiry into the details of the proposed prospectus, and at the meeting he did nothing to discharge his duty with regard to s. 38, except to ask the solicitor or to hear the solicitor asked by the other co-directors whether he, the solicitor, had taken care to see that all contracts that ought to be set forth in the prospectus were there properly set forth. [His Lordship referred to the evidence of the defendant, and continued:—]

Under these circumstances his allegation of not remembering appears to me to be a mere irrelevant and useless excuse. The fact is he made no inquiry into the contracts, and that was the reason why this contract was not set forth. If he had inquired into the contracts for the purpose of complying with the earlier part of s. 38 and doing his duty there is no reason, so far as I can see, for believing that this contract of October would not have been brought to his attention for consideration in connection with that section, even if it had not been previously present to his memory. But the fact was that he thought that everything should be left to the solicitor, and accord-

ingly he never exercised his memory one way or the other; he never tried to remember. He can no more be said to have ceased to remember this particular contract of October 27, 1898, than he ceased to remember any other of the contracts. His want of memory in this respect had nothing to do in fact with the form this prospectus took with reference to the provisions of s. 38. He left it to the solicitor entirely; and if the solicitor did, as may be the case, after conferring with Mr. Whitaker Wright, choose improperly to keep that contract out of the prospectus, this defendant cannot say that he was excused by the action of the solicitor under the circumstances. It appears to me that this defendant "knowingly issued" this prospectus within the meaning of those words as used in s. 38, and is responsible for it, and that his present and particular excuse wholly fails. I think, therefore, that his special point does not avail him.

COZENS-HARDY L.J. This appeal raises all the questions which have been dealt with in *Trechmann* v. *Calthorpe* (1) and *De la Cour* v. *Clinton* (1); but in addition one point was strenuously argued. The defendant MacLeay, the appellant, was actively concerned with Mr. Whitaker Wright in the negotiations which resulted in the taking over by the Standard of some companies of which he was director. He was one of the first directors of the Standard. He was present at the first meeting of the board in October, 1898, when the Austin Friars contract was approved and adopted on behalf of the Standard. He was also present at the second board meeting, at which the 40,000 shares, the consideration for that contract, were allotted to the London and Globe or its nominees. He was present at the third meeting, namely, on May 12, at which minutes of the previous meeting were read and confirmed; but he says that, although undoubtedly at one time he knew of the Austin Friars contract, he had in truth and in fact forgotten all about it when the prospectus was approved on May 12, and that therefore he is not liable because he did not "knowingly issue" the prospectus. He relies upon a passage in the judgment

(1) 20 Times L. R. 420, 706.

C. A. 1904 TAIT v. MACLEAY. Cozens-Hardy L.J.

of Cockburn C.J. in *Twycross* v. *Grant* (1): "'Knowingly issuing' means neither more nor less than issuing with a knowledge of the existence of contracts within the section, and the intentional omission of them from the prospectus." That statement of the law was entirely adequate for the case before the Court, though it may not be an exhaustive definition. I do not think that the word "intentional" can be regarded as strictly accurate if it imports that a director cannot be liable unless his attention is deliberately and consciously directed to a particular contract which he then purposely omits to mention. I accept the judgment of Byrne J. in *Watts* v. *Bucknall* (2) as correct. The evidence satisfies me that the defendant, who unquestionably knew there were some contracts which ought to be mentioned, left all matters relating to the contracts to Mr. Simmons, the solicitor. He made no inquiry about the contracts. He did not attempt to discharge the statutory obligation imposed by the first part of s. 38. He simply abstained from inquiry. In other words, he knowingly issued the prospectus without addressing his mind to the consideration of the question what contracts ought to be noticed. A man cannot properly be said to forget a matter to the existence of which he has not directed his attention. I think, therefore, that Kekewich J.'s judgment should be affirmed in substance, and the appeal dismissed with costs.

[The judgment of Kekewich J. was modified, so as in effect to make it accord with the judgment in the two other actions, by striking out all reference to the misrepresentations, and by limiting the defendant's liability to the case of the Austin Friars contract; but the Court declined to interfere with the order of the learned judge as to costs.]

Solicitors: *Gilbert Robins; Lesser & Danger.*

(1) 2 C. P. D. 542.

(2) [1902] 2 Ch. 628, 633.

H. B. H.

In re CHURCH PATRONAGE TRUST. LAURIE *v.* ATTORNEY-GENERAL.

C. A. 1904 July 28.

[1903 C. 1478.]

Charitable Trust—Advowson—Trust to appoint a Fit and Duly Qualified Person.

The owner of an advowson transferred it to trustees upon trust from time to time as a vacancy occurred to appoint to the living a fit and pious person of godly life and conversation, being in holy orders and capable of holding the same; and the trust deed provided that three at least of the full number of five trustees should be clergymen of the Church of England, and that only those should be eligible as trustees who should be of godly life and conversation, and should profess themselves members of the Established Church, and should be known to be zealously attached to the principles of the Reformed Faith contained in the Liturgy and Articles of the Established Church:—

Held, not a charitable trust, inasmuch as the deed contained no cestui que trust, and merely provided for the due performance of the duty cast by law upon every legal owner of an advowson to appoint a fit and duly qualified person to the living.

Decision of Buckley J., [1904] 1 Ch. 41, affirmed.

THIS was an appeal of the plaintiffs against a decision of Buckley J. (1)

The general facts are fully stated in the report below, but the trusts upon which the advowson was to be held require to be more fully set out for the purposes of the present report. Those trusts were contained in sched. 9 to a deed dated December 21, 1871, which was the governing deed of the Church Patronage Trust, and were as follows:—

"(1.) Upon trust that from time to time as often as the said vicarage and parish church of ——— shall become vacant by the death, resignation, deprivation, or cession of the incumbent or otherwise, the trustees for the time being of these presents do and shall nominate, appoint, and present to the same vicarage and parish church such fit and pious person of godly life and conversation, being in holy orders, capable of accepting and holding the same as the trustees for the time

(1) [1904] 1 Ch. 41.

C. A. 1904 CHURCH PATRONAGE TRUST, *In re.* LAURIE *v.* ATTORNEY-GENERAL.

being or the major part in number of them shall determine upon. And do and shall perform all such other acts, deeds, matters, and things as shall or may be requisite for enabling such person to hold and enjoy the same vicarage and parish church of ——— aforesaid.

"(2.) Provided always that it shall not be any objection to the person who may be appointed at any time to supply the vacancy for the time being of the said vicarage and parish church that he is one of the trustees for the time being of these presents."

Clause 3 provided for the appointment of new trustees in the case of any trustee dying or living abroad, or desiring to be discharged, or becoming incapable to act, "so that the number of five trustees, three of whom at the least shall be clergymen of the Established Church, may from time to time as far as circumstances will admit be kept up."

"(4.) Provided always and it is hereby expressly declared that only such persons shall be eligible to the office of trustees as shall be, or shall be well known or reputed to be, of godly life and conversation, and shall profess themselves members of the Established Church of England, and shall be known to be zealously attached to the great principles of the Reformed Faith contained in the Liturgy and Articles of the said Established Church.

"(5.) And further that no nomination or appointment of an incumbent to the said vicarage shall be made unless at the time of such nomination or appointment there shall be the full number of five trustees for the time being of these presents."

Levett, K.C., and *C. A. Montague Barlow*, for the plaintiffs. The object of this trust is to secure the appointment of the best man as vicar, and that is secured by vesting the right to appoint in the hands of five trustees of a particular line of thought, three of whom must be clergymen of the Church of England: see clauses 1, 3, 4, and 5 of sched. 9.

[VAUGHAN WILLIAMS L.J. Having regard to the use of the words "godly life and conversation" in clauses 1 and 4, and

to the context in clause 4, does not that involve that the vicar shall have the same qualifications as the trustees?—*Shore* v. *Wilson*. (1) Is not the intention to exclude a Ritualist?]

We do not contend that the trust imposes any particular qualification upon the parson beyond fitness; but any gift which secures the appointment of a good parson must be for the benefit of the parish, and is therefore a good charity: *Attorney-General* v. *Scott* (2); *In re St. Stephen, Coleman Street*. (3)

[COZENS-HARDY L.J. In both those cases the gift was to the parish. The parish was the cestui que trust.]

In *Foley* v. *Attorney-General* (4) the only cestui que trust was the Crown as representing charity at large. The reason why there can be a good charitable trust of an advowson is that it is for the advantage of the community to get the best man to fill the vacancy. In *In re Hunter* (5) all the Lords Justices thought that a gift of money for the purpose of buying an advowson for the advancement of a particular school of religious thought was good.

[ROMER L.J. An advowson exists, and the public already have the benefit of it. Can the present owner simply by executing a deed-poll stereotype the persons who are to hold the living in a particular way? The result might be to exclude moderate-minded men altogether. In *In re Hunter* (5) the Lords Justices do not appear to have appreciated the distinction between bringing in fresh property upon trust for a religious object, however narrow, and declaring the trusts of an advowson by narrowing the area of selection.]

The test is whether the limitation in the area of choice is for the benefit of the public. This is an a fortiori case. The object of the charity is to secure the selection of the best man as parson without any restriction, and it does not matter whether it is for the benefit of the parish or of the public at large. The trust is really a right to present. It is not an

(1) (1842) 9 Cl. & F. 355; 57 R. R. 2.

(2) (1750) 1 Ves. Sen. 413; also reported sub nom. *Wilson* v. *Dennison*, Amb. 82.

(3) (1888) 39 Ch. D. 492.

(4) (1721) 7 Bro. P. C. 249.

(5) [1897] 2 Ch. 105; reversed on other grounds by the House of Lords sub nom. *Hunter* v. *Attorney-General*, [1899] A. C. 309.

C. A. 1904 CHURCH PATRONAGE TRUST, *In re.* LAURIE *v.* ATTORNEY-GENERAL.

offence to present an improper person to a benefice, but the bishop has a right to veto. Nevertheless a private person can go on presenting. But under a trust of this kind the Attorney-General or the Ecclesiastical Commissioners could take action, and therefore an additional safeguard is provided against an unsuitable appointment.

R. J. Parker (*Sir R. Finlay, A.-G.*, with him), for the Attorney-General. The Attorney-General would naturally wish to support any charitable trust; but there being here no opposition, it is my duty to point out the difficulties in the way of holding this gift to be a charitable trust. A distinction must be drawn between an advowson quâ civil property and an advowson quâ ecclesiastical duty. So far as an advowson is civil property it may be made the subject of a trust; it may be limited like any other property for the benefit of the parish.

[VAUGHAN WILLIAMS L.J. I do not understand why a thing can be held for the benefit of a parish which the parish would equally get whether there was a trust or not.]

By the Sale of Advowsons Act, 1856 (19 & 20 Vict. c. 50), the parishioners may sell advowsons held in trust for them.

[VAUGHAN WILLIAMS L.J. Lord Bacon without the assistance of that Act came to the conclusion that the gift of an advowson to a parish was a good charitable trust. (1)

ROMER L.J. In *Attorney-General* v. *Webster* (2) Jessel M.R. treats that line of cases as anomalous.]

Kay J. in *In re St. Stephen, Coleman Street* (3), comes to the conclusion that there is no foundation for the view that a gift of an advowson to a parish is not a charitable trust, inasmuch as it is a benefit to the parish; and see Tyssen on Charitable Bequests, p. 95; *West* v. *Knight*. (4) On the other hand, quâ ecclesiastical duty an advowson cannot be put in trust or commission: Lewis on Perpetuities, p. 695.

[VAUGHAN WILLIAMS L.J. Does not that imply that the decision of the Court of Appeal in *In re Hunter* (5) was wrong?]

(1) See *Attorney-General* v. *Scott*, 1 Ves. Sen. 413.
(2) (1875) L. R. 20 Eq. 483, 491.
(3) 39 Ch. D. 492, 501.
(4) (1669) 1 Ch. Ca. 134.
(5) [1897] 2 Ch. 105.

If you give all your property for the advancement of particular religious views and incidentally you give a power to purchase advowsons, that might be good, and the decision might be supported on that ground. The parish does not get any benefit as to the presentation, but it gets the pecuniary value of the advowson. The difficulty in this case is to ascertain who is the cestui que trust. The duty to present a proper person to a benefice is a duty imposed by common law independently of any trust. As a matter of public policy it may be doubtful whether it is for the benefit of the public that the patronage should be in the hands of clerics rather than laymen, or that it should be in the hands of a corporation rather than an individual.

Vaughan Hawkins, for the Official Trustee of Charitable Lands. This trust must be supported, if at all, as a mode of securing a better choice of parson; but it may be doubted whether the additional benefit which will accrue to the parishioners from the appointment of the vicar under this trust is a sufficient ground for setting it up as an exception to the law of perpetuities. [He referred to Duke on Charitable Uses, p. 137.]

Levett, K.C., in reply. The cases do not proceed upon the distinction between civil property and ecclesiastical duty. The principle of selection is the foundation of Lord Hardwicke's decision in *Attorney-General* v. *Scott.* (1) This trust falls under the fourth head mentioned by Lord Macnaghten in his definition of charity in *Commissioners for Special Purposes of Income Tax* v. *Pemsel.* (2) After enumerating trusts for the relief of poverty, for the advancement of education, and for the advancement of religion, he makes a fourth class of "trusts for other purposes beneficial to the community, not falling under any of the preceding heads." The passage in Lewis on Perpetuities is inconsistent with *In re St. Stephen, Coleman Street.* (3)

[COZENS-HARDY L.J. It was settled long ago that an advowson might be given to a charity: *Attorney-General* v. *Ward.* (4)]

(1) 1 Ves. Sen. 413.
(2) [1891] A. C. 531, 583.
(3) 39 Ch. D. 492.
(4) (1829) 7 L. J. (O.S.) (Ch.) 114; 31 R. R. 123.

C. A.
1904
CHURCH PATRONAGE TRUST, *In re.*
LAURIE *v.* ATTORNEY-GENERAL.

VAUGHAN WILLIAMS L.J. I think that this appeal fails, and that the judgment of Buckley J. must be affirmed. The whole question which we have to decide in this case is whether certain dispositions made by the codicil of the testatrix, which clearly would be invalid as being against the law regarding perpetuities unless they can be brought within the exception in favour of charitable trusts, fall within this exception. That depends upon the provisions of the codicil when read with the trusts of the deed of December 21, 1871. [His Lordship referred to the provisions of the 9th schedule to the deed, and particularly to the clause which provided that three of the five trustees should be clergymen of the Established Church, and continued:—]

Speaking of this deed in connection with the codicil and the deed of appointment of February 14, 1903, Buckley J. said (1): "So far, therefore, I have a deed of appointment which I must read into the codicil, and the joint effect of the two is that the testatrix has devised to the persons who thus become appointees. They are to hold upon the trusts set forth in the 9th schedule to the deed of 1871. I am unable to find in the first clause of that schedule any direction to do anything further or other than what the owner of any advowson is bound to do. He ought to present a fit and pious person of godly life, who is in holy orders, and capable of accepting and holding the living. There is no trust expressed other than such as is involved in the duty of any owner of an advowson. If I turn to clause 4 of the schedule, I find there a definition or indication of the class of persons who are to be trustees. Assuming, although I do not think it is the case, that I could evolve from that description of the character of the trustees that they were bound to appoint a person of the particular religious persuasion which is pointed out by that clause, I do not find that any class of thought in the Established Church of England is there defined or pointed to. The trustees are simply to be persons of godly life, members of the Established Church of England, and attached to the principles of the Reformed Faith contained in the Liturgy and Articles of the

(1) [1904] 1 Ch. 49.

Established Church." So far I entirely agree with every word that Buckley J. said. I want now at this point to say a word upon that part of clause 3 which I have already referred to—"So that the number of five trustees, three of whom at the least shall be clergymen of the Established Church, may from time to time as far as circumstances will admit be kept up," because the appellants' counsel relied upon that also as being a provision which was put in for the express purpose, in the view of the testatrix, of bettering the choice of the parson to be presented—that is, bettering it according to her view as being more likely to result in the selection of a good parson, because the majority of those who were to make the appointment were to be clergymen of the Church of England.

Now, one has to consider whether this is a charitable trust within the meaning of the word when used with reference to the exception in favour of charitable trusts. The first thing one has to point out is that this is not a case where the testatrix has brought in any property or money, as to which she declares new trusts. All that she is doing by means of her will is to declare the trusts in respect of the advowson—that is to say, to declare in respect of the advowson that the parson appointed shall have the qualifications which have been set forth; but then, when one looks at those qualifications to see what they are, one finds they are only the qualifications which are required, independently of the declaration of the trusts, to be observed by every patron when he is presenting to a living. Therefore, in the first instance, there seems to be, as Buckley J. has pointed out, a very strong reason why this should not be held to be a charitable trust within the legal meaning of the term. There is nothing voluntarily done by the testatrix at all to enhance or increase the obligations which exist on the patron for the time being, whoever he may be, in respect of the presentation to the living.

The next observation which I wish to make as to the alleged charitable trust is this—that there is in this case no cestui que trust whatever. This is not like the case of a trust in favour of the parishioners of a particular parish. It is nothing of the sort. It is a trust without a cestui que trust, and it is a trust

C. A. 1904 — CHURCH PATRONAGE TRUST, *In re.* — LAURIE v. ATTORNEY-GENERAL. — Vaughan Williams L.J.

which really is only another mode of describing an existing duty which is cast by the law upon persons holding this class of property. I should like to say in passing that although in the course of the argument I asked the question whether the recognition of such a trust in favour of the parishioners of a parish was not an authority for the proposition that you might create a charitable trust in a case where that which was provided for was a better choice of the incumbent, the answer given to me was, I think, a perfectly sound one: that although it may possibly be (I do not know about it myself) that you would be likely to get a better choice if the parson was elected by the parishioners, that, at all events, is not the reason why the law has recognised such trusts in favour of the parishioners as charitable trusts. The law has recognised such trusts as charitable trusts merely in reference to the property which is conveyed; and that is indicated in the decision of Kay J. in *In re St. Stephen, Coleman Street* (1), where, quoting from the decision of the House of Lords in *Goodman* v. *Saltash Corporation* (2), the learned judge read these words of Lord Selborne: "A gift subject to a condition or trust for the benefit of the inhabitants of a parish or town, or of any particular class of such inhabitants, is (as I understand the law) a charitable trust: and no charitable trust can be void on the ground of perpetuity." Then Kay J. quotes what was said by Lord Cairns (3): "A grant of that kind, it appears to me, would be perfectly legal and perfectly intelligible, and there would be nothing in it which would infringe any principle of law. Such a condition would create that which in the very wide language of our Courts is called a charitable, that is to say a public, trust or interest, for the benefit of the free inhabitants of ancient tenements. A trust of that kind would not in any way infringe the law or rule against perpetuities." But one has not got such a case here. If there is a trust at all in this case it is a trust without a cestui que trust. It seems to me that those grounds are sufficient to shew that in this particular case there is great difficulty in saying there is a charitable trust.

(1) 39 Ch. D. 492. (2) (1882) 7 App. Cas. 633, 642. (3) 7 App. Cas. 650.

But the point most strongly urged on behalf of the appellants was that this might be a charitable trust because it might tend to the better choice of an incumbent, and in support of that contention a passage was read from the opinion of Lord Macnaghten in *Commissioners for Special Purposes of Income Tax* v. *Pemsel* (1), in which his Lordship defines what are charitable trusts. "'Charity' in its legal sense," he says, "comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion" (it was not claimed that this trust came within any of these definitions); "and trusts for other purposes beneficial to the community, not falling under any of the preceding heads." It was claimed that a trust which provided in a case like this for the better selection of the incumbent was a charitable trust under that fourth head. With regard to that, it is in the first place to be observed that if it is a charitable trust one would really be saying that the law of England, which allows an advowson to be treated as private property, is not a convenient law, and that it ought to be remedied, and that one way of remedying it would be to try as far as possible to prevent advowsons being vested in private individuals, and to cause them to be vested in bodies of people specially qualified to make a selection of an incumbent. I cannot agree to that. Some people may think that is a good thing, and some people may not, but I think it is impossible to say that a trust, the real object of which is to remedy the law of England, can be treated as a charitable trust. I do not mean by these observations to suggest that it is impossible that an advowson should be vested in trustees for a charity. Admittedly in the case of an advowson which is appendant to property the property may be conveyed to trustees for the objects of a charity, and in that case the trustees for the charity will hold, as part of the property so vested in them, the advowson. I do not know that it would militate against that that the same testator who left the property with the advowson appendant should express what his wishes were with

(1) [1891] A. C. 531, 583.

C. A. 1904 — CHURCH PATRONAGE TRUST, *In re.* LAURIE *v.* ATTORNEY-GENERAL. — Vaughan Williams L.J.

regard to the presentation to the particular living; and also I do not at all wish to suggest that an advowson might not be transferred—if the matter was put into a proper form, that is to say, dealt with as a mere transfer of property—to a charitable society, such, for example, as the Church Missionary Society. I merely wish to say that I do not think that the mere fact that the intention of the creator of the supposed charitable trust was to improve the choice of the parson to whom the living should be presented is sufficient to constitute this a charitable trust.

With regard to what was said about the views of the Lords Justices who were parties to the decision in the case of *In re Hunter* (1) in the Court of Appeal, that is a decision which, of course, binds us, so far as it is not overruled by the House of Lords; and if that decision is to be treated as an express authority for the proposition that a charitable trust may be created by a provision which limits the area of choice by saying that the parsons presented are all to be of a particular school of religious thought, I say first that, although that may seem to be laid down in the judgments of Lindley, Lopes, and Rigby L.JJ., yet they do not give any reasons which would guide one as to when such a limitation, for the purpose of improving the selection, is to be treated as a charitable trust. Secondly, I say that, although this point was not expressly taken when that case was taken to the House of Lords and the decision of the Court of Appeal was reversed, yet, when one reads the opinions of the Law Lords and the decision of Romer J. which they were replacing, I think it is very difficult, if not impossible, to suppose that the Law Lords who took part in that decision could have approved of that portion of the judgment of the Lords Justices in which they are supposed to have sanctioned the proposition that a limitation of the area of choice for the purpose of selection in accordance with the view of the creator of the alleged trust can be treated as constituting a "charitable trust." I think, therefore, that this appeal must be dismissed.

(1) [1897] 2 Ch. 105.

ROMER L.J. No doubt advowsons may be made the subject of good charitable trusts, for example, if they are held upon trust for a parish or its parishioners; but the question before us is in substance this: Can a trust be held a good charitable trust which has no cestuis que trust, unless they be the public by inference, and where the trust is in substance merely that the legal owners of the advowson, their heirs and assigns, shall take care to present fit and duly qualified persons as vacancies occur? For instance, would such a trust as I am about to mention be good? A case where the legal owner of an advowson for the time being by deed-poll declared that he, his heirs and assigns, should stand possessed of the advowson belonging to him upon trust that he and they, as vacancies should occur, would take care to present fit and duly qualified persons to fill the vacancies. I think not. Such a trust as that merely provides that the owner of the advowson for the time being shall properly discharge the duties cast upon him by the very nature of the property which he holds. I cannot think that such a trust of an advowson can lawfully be made perpetual by construing it as being charitable. I do not think it can be said that expressly making the owner of an advowson for the time being for the purposes of the discharge of his duty a trustee, instead of an ordinary owner of a charge, is so much for the benefit of the public, as leading to the probability of a better selection of the clergyman, as to justify the Court in holding that that in itself is sufficient to create a charitable trust. The effect of holding otherwise would be that any owner of an advowson for the time being could for ever afterwards tie up and bind the administration of the duties of presentation either by deed-poll, merely declaring himself and his heirs and assigns trustees in the appointing of clergymen to fill the vacancies of the living, or by conveying to another, his heirs and assigns, upon similar trusts. I think this would lead to results very far reaching, and much to be avoided. That view decides the present case, because on the facts I think that the trust which we have to consider cannot in substance but be classed as such a trust as I have before mentioned.

C. A.
1904
CHURCH PATRONAGE TRUST, *In re.*
LAURIE v. ATTORNEY-GENERAL.
Romer L.J.

I need not make any further observations on the decision of the Court of Appeal in *In re Hunter* (1) beyond those which I have already made in the course of the argument. In so far as the Court in that case decided that the trusts declared of an advowson merely directed to narrowing the choice of the clergymen to be appointed to vacancies by the owners for the time being were good charitable trusts, that case is distinguishable from the present. Whether, if the Court of Appeal did so decide, that decision was right, it is not for me to say. That must be for another Court.

COZENS-HARDY L.J. I agree, and have very little to add. In approaching this case we must start with this proposition —that according to English law an advowson is regarded as property—property, no doubt, of a peculiar kind to which certain ecclesiastical duties and obligations attach, and property which may be partially forfeited by the owner's laches or neglect of the discharge of those duties. If the owner of an advowson does not, on a vacancy occurring, within a certain time present a fit and proper clerk the law makes provision for his losing the right of presentation, and that right is vested in some other authority. It being a species of property, there is, I think, no doubt whatever that it may be subject to a charitable trust. The books are full of such cases. I would only mention the case of *Attorney-General* v. *Ward* (2), where an advowson was given to certain specified charities by will. In *In re St. Stephen, Coleman Street* (3), Kay J. gave a decision clearly in the same sense, and the statute of 19 & 20 Vict. c. 50, to which our attention has been called, proceeds on the same footing. But the question we have to decide is not whether an advowson can be the subject of a charitable gift. In order to create a valid trust you must have, not only a trustee, but a cestui que trust. That cestui que trust may be either an individual or individuals, or the public or a class of the public. But can you create a charitable trust by vesting an advowson in persons whom you call trustees, and imposing upon them

(1) [1897] 2 Ch. 105.
(2) 7 L. J. (O.S.) (Ch.) 114; 31 R. R. 123.
(3) 39 Ch. D. 492.

expressly the duty of discharging the precise obligation which the law implies in them as the owners of the advowson? I think not. No authority to this effect has been cited, and, if the contrary view to that which I have expressed were the law, I think it would be difficult to resist the conclusion that every owner of an advowson in this country holds it upon a charitable trust. I cannot see what difference it can make if an owner of an advowson who holds property subject to certain ecclesiastical obligations declares by deed that he holds it upon trust to discharge those ecclesiastical obligations. In this case, it seems to me all that the testatrix has really done is to secure that the advowson shall be vested in certain parties as owners of the advowson. That and nothing more has been done, and that does not create a charitable trust.

One word more. I do not think it necessary to consider what might have been the result if the trust had been to present only, say, members of the English Church Union or members of the Church Association. I desire to keep an entirely open mind as to that point; and, speaking for myself, I think there is nothing in the case of *In re Hunter* (1) in the Court of Appeal which would prevent this Court from considering and deciding that point whenever it arises.

Solicitors: *Bridges, Sawtell & Co.; Treasury Solicitor.*

(1) [1897] 2 Ch. 105.

H. B. H.

C. A.
1904
JOYCE J
March 10.
C. A.
Aug. 1.

In re LEWIS.
LEWIS *v.* LEWIS.

[1903 L. 1484.]

Executor—Legatee—Duty of Executor to give Notice of Legacy—Conditional Gift—Beneficial Interest of Executor on Breach of Condition—Estoppel.

Where a legacy is given upon a condition, an executor who takes a beneficial interest in the legacy on the breach of the condition owes no duty to the legatee to give notice of the terms of the legacy.

Dictum of Lord Hardwicke in *Chauncy* v. *Graydon*, (1743) 2 Atk. 616, 619, considered.

A testatrix appointed her son A. her executor and bequeathed a leasehold house to her son B., then abroad, and directed that in case he should not return and claim it it should go to A. After the death of the testatrix, A. wrote to B: "A house has been left you and according to the will it is to be in my hands until you claim it"; but he did not inform him of the gift over. B. died abroad without having claimed the house:—

Held (affirming Joyce J.), that A. was not estopped by the letter from claiming under the gift over, because (1.) there was no sufficiently precise representation that B. was absolutely entitled; (2.) it was not proved that the non-return of B. was the consequence of the representation.

Mary Lewis, of 63, Eirw Road, Porth, by her will dated February 17, 1893, after appointing her son, the defendant Edward Lewis, her executor, made the following bequest: "I give and bequeath my leasehold house No. 63, Eirw Road aforesaid unto my son Evan Lewis now abroad and direct that in case he should not return and claim the said house the same shall accrue unto my son Edward Lewis aforesaid."

The testatrix died on May 15, 1897, and her will was proved by the defendant.

At the date of her death her son Evan Lewis was resident at Chubut, in Patagonia. On August 16, 1897, the defendant sent to him a letter written in the Welsh language containing the following statement: "By now the will has been proved and a house has been left you and 56*l.* 13*s.*, which is under my care that is your brother and according to the will the house and the money are to be in my hands until you claim them."

The defendant did not, either in this letter or at any other time, inform Evan Lewis of the gift over of the house in the event of his not returning to claim it. The letter was not written by the defendant himself, but by one Edward Dunston as his agent, and on April 5, 1898, Dunston, on behalf of the defendant, wrote a further letter to Evan Lewis with reference to the house. This letter contained the following passage: "Some repairs are necessary as the water is doing harm to the wall but if you would care to sell the house your brother Edward is willing to give 140*l.* for it as it stands."

Both these letters were received by Evan Lewis, who died intestate on February 25, 1899, at Chubut, without having become aware of the gift over.

This action was brought by the administrator of Evan Lewis for a declaration that, having regard to the omission by the defendant to disclose the gift over, the plaintiff was absolutely entitled to the house.

The plaintiff by his statement of claim alleged fraud on the part of the defendant, but the charge of fraud was abandoned at the trial.

The action was heard before Joyce J. on March 10, 1904.

R. Rowlands, for the plaintiff. The letter written by or on behalf of the defendant to Evan Lewis amounted to a representation that the legacy was an absolute gift. The defendant is estopped from denying the truth of that representation: *Low* v. *Bouverie*. (1) An omission to state the real truth may amount to a misrepresentation. If an executor gives information he must give it accurately. He cannot be heard to say that he has made a mistake. It may be said that the plaintiff must shew that Evan Lewis was induced by the letters to remain in Patagonia. I submit, however, that the onus is upon the defendant: *Smith* v. *Kay*. (2)

Again, by treating with Evan Lewis through Dunston the defendant must be taken to have waived the benefit of the gift over.

Moreover, the gift over is too indefinite to be enforced. No

(1) [1891] 3 Ch. 82. (2) (1859) 7 H. L. C. 750.

C. A. 1904 LEWIS, *In re.* LEWIS *v.* LEWIS.

limit of time is fixed within which Evan Lewis must return to claim the legacy. This is a case in which the Court will try to assist the plaintiff.

Hughes, K.C., and *C. L. Coote*, for the defendant. There are two essentials for estoppel in a case of this sort: (1.) the statement which is relied on must be clear and unambiguous; (2.) the person setting up the estoppel must prove that he acted on the statement.

There was no statement by the defendant that the gift was without condition. No doubt there may be cases in which omission may amount to misstatement; but that is not so here.

[JOYCE J. Was not Evan Lewis lulled into security by the defendant, who was in a fiduciary capacity, and who was the person to take in default of the condition being performed?]

There is no obligation upon an executor to give notice of a legacy to a legatee: *In re Hodges' Legacy* (1); *Powell* v. *Rawle* (2); *Astley* v. *Earl of Essex* (3); *Lady Fry's Case* (4); *Chauncy* v. *Graydon* (5); Roper on Legacies, 4th ed. p. 839.

Of course, if an executor gives information he is under an obligation to give it accurately. In *Lovett* v. *Lovett* (6) it was held that an inaccurate recital in a deed did not work an estoppel, the statement being accurate so far as it went; so here the statement is perfectly accurate so far as it goes. The plaintiff must shew that it was acted on.

In order to establish a waiver, the plaintiff must shew that Edward Lewis knew of his rights and deliberately abstained from enforcing them.

R. Rowlands, in reply. In all the cases as to legatees omitting to claim, there was, first, a limit of time, and, secondly, no communication between the executor and the legatee giving any information at all. There could, therefore, be no estoppel.

It is the duty of an executor to give the legatee information as to the condition under which the legacy is to be taken. In

(1) (1873) L. R. 16 Eq. 92.
(2) (1874) L. R. 18 Eq. 243.
(3) (1874) L. R. 18 Eq. 290.
(4) (1671) 1 Vent. 199.
(5) 2 Atk. 616.
(6) [1898] 1 Ch. 82.

Low v. *Bouverie* (1) the Lords Justices affirmed *Burrowes* v. *Lock* (2), which was on all-fours with this case.

JOYCE J. In this case the testatrix, Mrs. Lewis, gave to her son Evan Lewis a leasehold house, and directed that in case he should not return and claim the said house the same should accrue unto her son Edward Lewis, the defendant. She died on May 15, 1897. At that time Evan Lewis was resident in Patagonia, to communicate with which country it takes four or five months. After her death Edward Lewis, the executor, wrote to his brother Evan Lewis, through the agency of one Dunston, telling him of the legacy, but without saying a word as to the clause in the will requiring him to come home and claim it; and in a further letter he proposed to purchase the house from Evan Lewis at a price stated in the letter. Edward Lewis was in a fiduciary relation to Evan Lewis, and he was, moreover, the person to benefit by the failure of Evan Lewis to fulfil the condition. I do not think, however, that the letters were written with any intention to deceive, though they were certainly very unfortunate. While this correspondence was going on, in 1899 Evan Lewis died. Administration to his estate was taken out by his son, the plaintiff, who now claims to be entitled to the house on the ground that Edward Lewis is estopped by his letters from asserting any title to it. I feel a great difficulty in holding that. I do not think that the letters contained any such precise representation as would amount to an estoppel, nor is it proved that Evan Lewis would have returned to this country and claimed the house if he had known the truth as to the terms of the gift. Then it was said that Edward Lewis has waived his right to the benefit of the gift over. But in order to establish a waiver it must be shewn that the person who waives knew of his rights and deliberately abstained from asserting them. On the whole, having regard to the terms of the will, and treating it as a gift over, I feel bound to decide against the plaintiff. There will be no costs to either side.

G. A. S.

(1) [1891] 3 Ch. 82.

(2) (1805) 10 Ves. 470; 8 R. R. 33, 856.

C. A. 1904 LEWIS, *In re.* LEWIS *v.* LEWIS. C. A.

The plaintiff appealed. The appeal came on for hearing on August 1, 1904.

R. Rowlands, for the plaintiff. (1.) It is the duty of an executor who takes a benefit under a gift to communicate the fact to the legatee, otherwise he cannot accept the benefit. No doubt an executor is not bound to give notice to a legatee as to the terms of the legacy unless the executor takes a benefit under it: Roper on Legacies, 4th ed. p. 839; *Chauncy* v. *Graydon* (1); but in that case Lord Hardwicke lays stress on the fact that the executor took no beneficial interest under the gift (2), and the inference is that his decision would have been the other way if the executor had taken a benefit. In the case of a devise of real estate to the heir-at-law it is settled that notice must be given: *Doe* v. *Lord Beauclerk* (3); and the reason given by Lord Ellenborough for that view is that the contrary decision would be an inducement to suppress wills.

[COZENS-HARDY L.J. That case turns on the fact that the heir had a title independently of the will.]

Assuming that there is no absolute duty on an executor who takes a benefit under the gift to disclose, if he takes upon himself the duty of disclosing the terms of the gift he must state them correctly, otherwise he cannot take advantage of his mistake.

(2.) Apart from any question of duty, the defendant, having represented to Evan that he was absolutely entitled to the house, is estopped from denying the truth of his representation.

Joyce J. held, first, that the representation was not sufficiently definite; secondly, that there was no certainty that the legatee would have returned if he had known the truth. No doubt in order to create an estoppel the language must be precise and unambiguous: *Low* v. *Bouverie* (4); but there was here a sufficiently clear statement that the house belonged to Evan, and his acts were perfectly consistent with that hypothesis; and where a clear representation is made, and the conduct of the person who sets up the estoppel is consistent

(1) 2 Atk. 616.
(2) Ibid. 619.
(3) (1809) 11 East, 657; 11 R. R. 307.
(4) [1891] 3 Ch. 82, 106.

with his having acted on the faith of that representation, it is submitted that the burden of proof is on the person making the representation to shew that the other party did not so act: *In re Safety Explosives, Ld.* (1)

(3.) The offer to purchase the house amounted to a waiver by the defendant of his rights under the legacy.

Hughes, K.C., and *C. L. Coote*, for the defendant.

VAUGHAN WILLIAMS L.J. This is a very hard case; but one must not because it is a hard case lay down principles which are not in accordance with the law. Mr. Rowlands has argued this case with a full recognition on his part of the real difficulties which lay in his way, which in my opinion is the best form of advocacy. He had to start with this admission—that primâ facie there was no duty on the executor to disclose; and then he had also to admit that the mere fact that Evan Lewis had no notice of this provision in the bequest of the leasehold house to himself would not of itself have relieved him of the consequence, to use the very words of the will, of his not having returned from abroad and claimed the said house. The consequence of that is that the gift over in favour of Edward Lewis primâ facie takes effect. At the time when this will was made Evan Lewis, one of the sons of the testatrix, was abroad. The bequest in his favour is in these words: [His Lordship read the bequest, and continued:—]

We have got thus far—that there is no duty on the executor to disclose, and that primâ facie, inasmuch as Evan Lewis never did, and now never can, return from abroad and claim the house, his administrator cannot successfully claim it unless there is something else to assist. It is said, however, that, though generally there is no duty on the executor, yet in this particular case there is a duty, because by reason of the gift over the executor will get an advantage; and for that proposition reliance is placed upon an observation of Lord Hardwicke in *Chauncy* v. *Graydon* (2), of which the marginal note is this: "Where there is a condition annexed by a will to a devise of real or personal estate, and no notice required to be given, unless the legatees perform the condition, they cannot be

(1) [1904] 1 Ch. 226, 230. (2) 2 Atk. 616, 619.

C. A. 1904 LEWIS. *In re.* LEWIS *v.* LEWIS. Vaughan Williams L.J.

entitled, and where there is a devise over, a forfeiture incurs." As Mr. Rowlands very properly says, that is against him; but in giving judgment Lord Hardwicke is made to say this: "It is said the executors should have given notice, but the testator has laid no such obligation upon them, neither do the executors take any beneficial interest, whether the condition be performed or broken." It is said of that passage that, although it assumes that generally there is no duty on the executor to give notice, it puts an exception to that rule where a testator has by the terms of his will laid an obligation upon the executor, or where the executor takes some beneficial interest. If one were sure that Lord Hardwicke intended to decide anything of the sort, one would give further consideration to the contention founded on that passage. But the question which we have to decide was not raised in that case, and there was no argument based on the assumption that an executor who took a beneficial interest had a special obligation to give notice. That being so, it seems to me we must start with the assumption that there is no duty to give notice imposed on the executor either by the general law or by the special provisions of the will. Under these circumstances, what is the position of the plaintiff? The plaintiff must either make out misrepresentation amounting to fraud, or a misrepresentation acted upon on which an estoppel can be based. It is admitted that fraud cannot be maintained. This is merely a case of estoppel, and the estoppel is supposed to be based on the assumption that on the correspondence the executor by himself or his agent represented that the bequest of the house was a simple bequest without any such condition as in fact existed, and that Evan Lewis changed his position in consequence of this representation. It seems to me that he did not change his position in consequence of that representation. I very much doubt whether one can find in these letters the statement of fact relied on; but even if one could, it is plain that there is no proof that the non-return of Evan Lewis to claim was the consequence of his acting upon this representation. I think that the onus was on the plaintiff to prove that; so that in the result there are two reasons why this alleged estoppel fails. One is because the letters contain no statement sufficiently precise and clear to form the basis of the

estoppel; the second is that, even if there was a sufficiently precise and clear statement, there is no proof that it was acted upon. For these reasons I think that the judgment of Joyce J. was right, and that the appeal must be dismissed with costs.

ROMER L.J. I am of the same opinion. When once the plaintiff withdrew, as he was bound to do, all charges of fraud against the defendant, I think that his case failed. It is said, in the first place, that the defendant had a duty cast on him to give express notice to his brother of the executory gift over in this will, and apparently also that the effect of his neglect of that alleged duty has been to deprive the defendant of his interest under the gift over in favour of his deceased brother's representative. It is clear that if the executor in this case had not also been the person entitled under the gift over it could not have been contended since *Chauncy* v. *Graydon* (1) that there was any such duty cast upon him. It is also clear that if the defendant had not been the executor it could not have been said that there was any duty cast upon him in his position of devisee under the gift over. That being so, it is difficult to see how you can imply a duty because these two positions coalesce when neither of the positions involves such duty. I cannot see any sufficient reason for holding that such a duty is cast on the defendant as is contended for here, and, unless the exigencies of the case require it, I think that we ought not to imply a duty not recognised by the law as it stands. There is no authority for implying such a duty, and there would be great difficulty in considering what kind of duty could be implied. It could not be said that there was an absolute duty. The appellant's counsel naturally shrank from so contending. It could not be said, for example, that there was any duty cast on an executor in a case where he did not know and could not find out where the legatee was living. If the Court cannot imply an absolute duty, it is difficult to see in what case it can imply a duty. But it was said that there was a duty to take reasonable care. Reasonable with regard to what? It must be reasonable, I suppose, having regard not only to the position of the absent legatee, but to the position of the executor. I

(1) 2 Atk. 616.

C. A. 1904 LEWIS, *In re.* LEWIS *v.* LEWIS. Romer L.J.

should think that the difficulties in the way of the Court implying such a duty as is contended for are such that certainly the Court ought not to imply a duty unless bound to do so by authority—and there is no such authority. I think, therefore, that the main contention urged on the part of the appellant entirely fails. I have nothing to add on the question of estoppel. There is no case of estoppel to enable the plaintiff to maintain the action.

COZENS-HARDY L.J. I agree, and for the same reasons. But the case has been so well argued that I think I ought to add a few words. There is no fraud relied on here. If fraud had been relied on, entirely different considerations would have arisen. That being so, we start with this—that it is plain there is no primâ facie duty resting on an executor to give notice. But it is said that although that is so, there is an exception in the case of an executor having himself an interest in the legacy. For that there is no trace of authority in the way of decision, and no trace of an opinion by any text-writer. There is nothing but the passage in Lord Hardwicke's judgment which the industry of counsel has succeeded in unearthing. I do not regard that as anything more than the sort of observation which a judge might make upon a point which was not argued before him and which did not arise in the case. There is no suggestion that it did. I cannot regard that as making an exception to the general rule as to the necessity of communicating. As to the estoppel, I also agree with what my Lord has said. The language of the letters is not sufficiently clear to found an estoppel upon; even if it was, I cannot see how that can avail the plaintiff, because the burden is on him to prove that Evan Lewis changed his position in consequence of the representation. One word more. Mr. Rowlands endeavoured to found an argument on the point of waiver. I fail to appreciate that argument. How making an offer that was never accepted can be held to destroy the gift over I fail to see.

Solicitors: *Wrentmore & Son, for Spickett & Sons, Pontypridd; Helder, Roberts & Co., for W. R. Davies & Co., Pontypridd.*

H. B. H.

In re WINGFIELD & BLEW (SOLICITORS).

C. A.
1904
WARRINGTON J.
July 11.
C. A.
Aug. 3.

Practice—Costs—Taxation—Divorce—Judicial Separation—Implied Authority to Wife to pledge her Husband's Credit—Matrimonial Causes Act, 1857 (20 & 21 *Vict. c.* 85), *s.* 26.

Sect. 26 of the Matrimonial Causes Act, 1857, absolutely puts an end to the right of a wife who has obtained a decree for judicial separation to pledge her husband's credit or to contract on his behalf during the continuance of the judicial separation except where alimony has been decreed and has not been duly paid.

Consequently, so long as the husband duly pays the alimony which he has been ordered to pay, the wife has no power to pledge his credit for necessaries which the alimony could not have been reasonably supposed to cover, as where the wife has been put to expense by the misconduct of the husband, and the principle of *Turner* v. *Rookes*, (1839) 10 Ad. & E. 47; 50 R. R. 320, no longer applies.

So *held* by the Court of Appeal (reversing Warrington J.).

The provision in the second part of the section with regard to the wife's contracts, that "the husband shall not be liable in respect of any engagement or contract she may have entered into," is governed by the preceding part of the section, which provides that the wife, "whilst so separated," shall be considered a feme sole for the purposes of contract, and is limited to engagements and contracts entered into by the wife during the period of separation.

Consequently the husband is not relieved by a decree of judicial separation from his liability under a contract which has been properly entered into by the wife on his account under her implied agency by reason of the coverture, and which remains in fieri at the date of the decree.

A wife acting under the implied authority of the husband retained a solicitor to defend her in a divorce suit instituted by her husband, and also to commence an action of detinue against her husband in respect of her clothes. The divorce suit was dismissed against the husband with costs, and a decree of judicial separation was made in favour of the wife. After the decree of judicial separation the wife obtained, first, an order increasing the interim alimony which had been previously allowed her, and, afterwards, an order for permanent alimony, and the action for detinue was tried and decided in the wife's favour. In the meantime the husband had instituted a second divorce suit, which was also resisted by the wife and dismissed with costs. On the taxation of the wife's costs of these proceedings under an order of course obtained by her solicitor against the husband, the husband, who had duly paid the alimony as required by s. 26 of the Matrimonial Causes Act, 1857, disputed his liability to pay any

C. A.
1904
WINGFIELD & BLEW (SOLICITORS), *In re.*

costs (beyond the party and party costs, which he had been ordered to pay) after the decree of judicial separation:—

Held, (1.) as to the costs of the second divorce suit (reversing Warrington J.), that the husband was not liable; (2.) as to the costs of the action of detinue (affirming Warrington J.), that the husband was liable inasmuch as the retainer continued until the conclusion of the action unless expressly withdrawn by the husband; (3.) as to the costs of the alimony proceedings (affirming Warrington J.), that the husband was liable inasmuch as they were part of the proceedings in the first divorce suit.

SUMMONS to review taxation.

The costs to which this summons related were costs incurred by Mrs. Harry Pinson in defending herself against certain divorce proceedings instituted by her husband and in matters incidental thereto, and the question was as to her implied authority to pledge her husband's credit for those costs.

Mr. and Mrs. Pinson were married in January, 1888.

In August, 1901, the husband turned his wife out of doors, and on October 30 he presented a petition against her for divorce.

On November 29, 1901, the wife retained Messrs. Wingfield & Blew to act for her in defending her against this petition.

On December 13, 1901, she employed them to commence an action for detinue against her husband in respect of her clothes.

On February 4, 1902, an order for interim alimony was made in the divorce proceedings.

On April 25, 1902, the divorce petition was dismissed with costs, and a decree for judicial separation was made in favour of the wife with the custody of the children.

On July 15, 1902, the husband presented a second petition against the wife for divorce.

In August, 1902, the wife applied for permanent alimony, but her application was resisted by the husband upon the ground that the second petition was pending, and it was refused by the registrar; and upon appeal the judge declined to interfere with the registrar's discretion.

On September 4, 1902, an order was made increasing the interim alimony.

On October 30, 1902, the action for detinue was decided substantially in favour of the wife.

On February 27, 1903, the second divorce petition was dismissed with costs.

On March 17, 1903, an order was made for permanent alimony, and the order provided that all arrears should be paid as from the date of the decree for judicial separation.

On June 13, 1903, Messrs. Wingfield & Blew delivered to the husband three bills of costs. The first bill related to the divorce proceedings, including the first and second petitions and the alimony proceedings. The second bill related to the action for detinue. The third bill related to a small matter, as to which this case is not reported. The party and party costs of these proceedings had already been paid by the husband, and credit was given to the husband for the amount so paid, the claim made by the bills being only for the difference between party and party costs and solicitor and client costs.

On July 29, 1903, Messrs. Wingfield & Blew obtained an order of course for taxation. The order recited that it was alleged by the petition "that the petitioners were employed by Harry Pinson by his agent Joanna Mary Pinson his wife of Wolverhampton in the county of Stafford to transact various matters of business for her as such wife of and incident to proceedings for divorce instituted by the said Harry Pinson between the years 1901 and 1903 inclusive."

Upon the taxation certain preliminary questions were raised as to the husband's liability, and these questions were disposed of by the taxing master before dealing with the bills in detail. The taxing master decided that the husband was liable for taxed solicitor and client costs in the divorce proceedings up to the date of the order for judicial separation, and for any subsequent costs in respect of the completion of that order, and that as to the detinue action he was liable up to the same date, and no further.

Messrs. Wingfield & Blew then took out this summons asking that the decision of the taxing master might be reversed.

The summons originally came on for hearing before Byrne J., who adjourned it until after taxation with liberty to amend.

C. A. 1904 ~~ WINGFIELD & BLEW (SOLICITORS), *In re.*

The taxation was then proceeded with. The summons came on for hearing before Warrington J. on July 11, 1904.

The question of the husband's liability turned upon s. 26 of the Matrimonial Causes Act, 1857, which provides as follows: "In every case of a judicial separation the wife shall, whilst so separated, be considered as a feme sole for the purposes of contract, and wrongs and injuries, and suing and being sued in any civil proceeding; and her husband shall not be liable in respect of any engagement or contract she may have entered into, or for any wrongful act or omission by her, or for any costs she may incur as plaintiff or defendant: Provided, that where upon any such judicial separation alimony has been decreed or ordered to be paid to the wife, and the same shall not be duly paid by the husband, he shall be liable for necessaries supplied for her use."

It was conceded that the husband had punctually paid the alimony which he had been ordered to pay.

Norton, K.C., and *Van Neck*, for the applicants. The solicitor employed by the wife is entitled to get from the husband all extra costs reasonably incurred by him beyond the ordinary party and party costs: *Ottaway* v. *Hamilton*. (1) These extra costs are "necessaries" for which the wife is entitled to pledge her husband's credit. The wording of ss. 25 and 26 of the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), declaring the wife to be a feme sole from the date of the sentence of judicial separation was not intended to interfere with the rule as to costs incurred in divorce proceedings; the solicitors were bound to go on with the defence of the second petition, and no fresh retainer was necessary in this case. All the costs incidental to obtaining permanent alimony from the husband are payable by him in any event: *Harrison* v. *Harrison*. (2) The original retainer by the wife was for the whole conduct of these divorce proceedings until the end, and once retained the solicitors were bound to go on: *Underwood, Son & Piper* v. *Lewis* (3); *Court* v. *Berlin*. (4) The second petition

(1) (1878) 3 C. P. D. 393.
(2) (1888) 13 P. D. 180.
(3) [1894] 2 Q. B. 306.
(4) [1897] 2 Q. B. 396.

must be regarded as merely a continuation of the first, and the principle of these cases applies to all the costs incurred in the whole of the divorce proceedings. As to the costs of the detinue action, the husband cannot put his wife to any expense without having to pay for it; the wife therefore had a common law right to pledge her husband's credit for costs which were reasonably necessary and proper in a matter which had been caused by his conduct: *Keegan* v. *Smith*. (1) The fact that alimony has been decreed is not an absolute bar to all costs: *Turner* v. *Rookes* (2); so that even if the Court should be of opinion that the second petition was not a continuation of the first, and consequently that a fresh retainer was necessary, still alimony was not given to enable the wife to oppose the second petition, and the principle of *Turner* v. *Rookes* (3) and the observations of Lord Denman C.J. apply, and the costs of the second petition are properly payable by the husband.

Rowden, K.C., and *Sheldon*, for the husband. The liability of the husband for costs or other "necessaries" ceases after sentence of judicial separation so long as alimony is paid; from the date of the sentence the wife is a feme sole and can no longer pledge her husband's credit: s. 26 of the Matrimonial Causes Act, 1857, clearly defines the husband's liability; the payment of alimony determines the authority of the wife to pledge her husband's credit for necessaries: Lush on Law of Husband and Wife, 2nd ed. p. 364; *Manby* v. *Scott*. (4) The wife is therefore only entitled to the costs of the first petition up to the time of sentence for separation. Retainer to defend the first petition cannot be treated as a retainer to defend the second petition; when the second petition was presented the wife was a feme sole, and her agency for her husband had come to an end by the wording of the statute. *Underwood, Son & Piper* v. *Lewis* (5) and *Court* v. *Berlin* (6) only shew that a solicitor cannot withdraw from an action till it is finished, and have nothing to do with the present case; the taxing master

(1) (1826) 5 B. & C. 375; 29 R. R. 273.
(2) 10 Ad. & E. 47; 50 R. R. 320.
(3) 10 Ad. & E. 48.
(4) (1660) 2 Sm. L. C. 11th ed. pp. 446, 500.
(5) [1894] 2 Q. B. 306.
(6) [1897] 2 Q. B. 396.

C. A. 1904 WINGFIELD & BLEW (SOLICITORS), *In re.*

was quite right in disallowing the costs of the second petition. *Turner* v. *Rookes* (1) was a case where violence was threatened by the husband, and the wife was held entitled to make him pay the costs of proceedings taken for her protection: quite a different case from the present. The detinue action had nothing to do with divorce proceedings: the costs of that ought not to have been allowed.

Norton, K.C., in reply.

WARRINGTON J. This is an application for a review of taxation, and it raises some rather curious points. The application is by Messrs. Wingfield & Blew, who were retained by Mrs. Pinson to represent her in certain divorce proceedings between herself and her husband, and the question is as to the liability of the husband for the costs as between solicitor and client, or rather for the difference between the costs as between solicitor and client and the costs as between party and party of the wife in those proceedings and in certain other proceedings incidental thereto, which I will mention presently.

The question arises, first, with regard to the costs of the original petition subsequently to the decree for judicial separation; secondly, with regard to the costs of the detinue action; thirdly, with regard to the costs of the second petition.

First, with regard to the costs of the original divorce proceedings, the taxing master has refused to allow any of the costs incurred in that matter subsequent to April 25, 1902, on the ground that by the judicial separation the authority of the wife to pledge the husband's credit was determined, and that all costs incurred after that date were incurred on the responsibility of the wife and not on the responsibility of the husband. [His Lordship referred to s. 26 of the Matrimonial Causes Act, 1857, and continued:—]

Now I think, dealing with the costs of original divorce proceedings, one point is beyond dispute, namely, that the husband is liable as necessaries for the costs incurred by the wife in defending herself against the petition for divorce. Stated in those general terms, I think that that proposition is supported

(1) 10 Ad. & E. 47; 50 R. R. 320.

by the case of *Ottaway* v. *Hamilton*. (1) The question here is, how far does that liability extend; and I think that question can only be solved by considering what is the nature of the obligation incurred by the client when he employs a solicitor. Now the obligation of the solicitor to the client has been laid down in *Underwood, Son & Piper* v. *Lewis* (2), and it is this: that subject to his being reasonably provided with the sinews of war, a solicitor retained to conduct or defend an ordinary action—I am not talking about Chancery administration suits or anything of that sort, but an ordinary action—is bound to conduct it to the end, and is not at liberty to throw it up in the middle and to say, "I will not go on; I will conduct it no longer." The nature of the contract of the client with the solicitor is, I think, shewn by the case of *Court* v. *Berlin* (3), which was referred to in argument, and I think that the nature of that obligation is that he will pay the solicitor for all costs properly incurred by the solicitor in prosecuting or defending the action under his original retainer until that retainer is withdrawn. It seems to me that the point of that action was, that it is unnecessary for the solicitor in order to recover from the client to obtain fresh instructions from him at every stage of the case. The facts of that case were extremely like the present. It arose out of an action brought by the acting member of a firm of partners through a solicitor whom he instructed against a third person, and the question was whether two dormant partners were liable for costs incurred in that action subsequent to the dissolution of partnership. The Court said they were. It is quite true that in that case the solicitor did not know either that they were dormant partners or that the partnership had been dissolved; but it seems to me that the real ground upon which certainly Lord Esher, and, I think, A. L. Smith L.J., also put the decision, was that there had been no withdrawal of the authority by force of which the original instructions had been given. It seems to me, therefore, on that principle, that the husband here is liable for solicitor and client costs of the original divorce petition on the

(1) 3 C. P. D. 393. (2) [1894] 2 Q. B. 306.
(3) [1897] 2 Q. B. 396.

C. A. 1904

WINGFIELD & BLEW (SOLICITORS), *In re.*

Warrington J.

ground that those costs were incurred by virtue of a retainer given with his authority and never withdrawn.

Then with regard to the action for detinue. There, again, that action was occasioned by the conduct of the husband. The wife was justified in instructing a solicitor to act for her. I think the costs properly incurred in that action were necessaries, and that the husband, not having withdrawn the retainer, is liable for the costs of that action properly incurred under the original retainer for which he was liable.

Now I come to a much more difficult question. The husband during the pendency of the original proceedings presented a second petition, and it is said that the solicitor is entitled to recover the solicitor and client costs in respect of that petition. Now it is put in more ways than one. It is said, first, that the second petition was really a continuation of the original petition, and reliance is placed quite properly on the conduct of the husband on the application for permanent alimony, which he resisted on the ground that the second petition was pending. But I think, when one considers what the real nature of the question is, it is impossible to hold that the second petition was a continuation of those first proceedings. In order to make the husband liable on this ground for the costs of that second petition, the defence by the wife's solicitors must be held to be under the original retainer—that is to say, one must hold that the solicitor would not have been entitled to recover the costs of defending the first petition if he had refused to defend the second. Now I do not think that is so. I think that the second petition for that purpose was a fresh proceeding requiring a fresh retainer on the part of the client, and a retainer, therefore, which, but for the circumstances which I will mention directly, would not be a retainer binding the husband. But that does not dispose of the whole question. I have read the 26th section, which it will be remembered provides that after a judicial separation the husband is not to be held liable in respect of any contracts the wife may have entered into or for any costs she may have incurred as plaintiff or defendant, with a proviso that where alimony has been decreed and ordered to be paid and the same shall not be paid,

then he shall be liable for necessaries supplied to her use. I take it the effect of that section plainly is to do away with the primâ facie liability of the husband for necessaries supplied to the wife in cases where alimony is decreed and has been paid. Does it do away with the liability of the husband for necessaries under certain special circumstances, which the Court may conclude were not intended to be covered by the allowance of alimony? My attention has been called to the case of *Turner* v. *Rookes* (1), on which the argument in support of the objection to the taxing master's certificate on this point depends. That was an action by a solicitor against a husband for the recovery of costs incurred by the wife in proceedings against the husband for protection from his violence. There was alimony there; alimony had been granted and was treated as paid; but it was held that, notwithstanding that, the wife was entitled to employ a solicitor, and to charge the costs of employing that solicitor against the husband.

Now, it is quite true that the actual circumstance which rendered it necessary to employ the solicitor was the personal violence of the husband; but Lord Denman C.J. in the course of the argument dealt with the matter, it seems to me, upon a much broader footing. Counsel for the husband was arguing that the amount allowed for alimony was sufficient, and Lord Denman said this: "I do not see that the separate maintenance has anything to do with the question. She has that for other purposes: this cannot have been contemplated in making the allowance"; and Littledale J. said: "I think so too." The two judges then consulted Maule B., who had tried the action, and in the result Lord Denman delivered judgment in these terms. He said: "On referring to the notes of the evidence, there appears sufficient to shew that the wife was in personal danger which warranted her exhibiting articles of the peace. Then the question is, whether the defendant was liable for the costs, it appearing that he allowed his wife a separate maintenance. There was some discussion as to the sufficiency of the allowance, but we need not go into that. The defendant was proved to have himself committed violence against his

(1) 10 Ad. & E. 47, 48, 49; 50 R. R. 320.

C. A. 1904 WINGFIELD & BLEW (SOLICITORS), *In re.* Warrington J.

wife, and he cannot avail himself of the maintenance to exempt him from the charges incurred by his own violent conduct." Now, it is quite true that in giving that judgment it was the actual personal violence on which the judge laid stress; but I think he is only in effect enforcing a particular application of the general principle which he had previously expressed at the close of the argument, and I think that what he would really have decided if this case had come before him would have been that, inasmuch as the husband had put the wife to these costs by presenting the second petition, the costs of which it could not be supposed were covered by an allowance for alimony for other purposes, the solicitor would be entitled to treat the costs so incurred as necessaries, and would be entitled to sue the husband for these costs as necessaries incurred not covered by the allowance for alimony. It is said that the first part of s. 26 relieves the husband from liability. I do not think so. I think the first part of the section is subject to an exception in the case of necessaries, and that, notwithstanding that, the husband is liable to be sued for necessaries unless he pays alimony, if alimony is allowed, or unless his conduct has put the wife to expense which, on the principle of *Turner* v. *Rookes* (1), would be regarded as necessaries incurred. I think, therefore, that that objection ought also to succeed.

W. C. D.

C. A.

The husband appealed. The appeal came on for hearing on August 3, 1904.

Rowden, K.C. (*Montague Lush, K.C.*, and *Sheldon* with him), for the husband, was proceeding to argue that the husband was not liable for the costs of the second divorce petition, when

THE COURT took the objection that having regard to the recital in the order for taxation that the retainer continued from 1901 to 1903, this point was not open to the husband, inasmuch as he ought to have moved to discharge the order.

Rowden, K.C. The order was obtained by the solicitors, not by the husband, and there are proceedings to which it is pro-

(1) 10 Ad. & E. 47, 48, 49; 50 R. R. 320.

perly applicable. Where a solicitor obtains the common order to tax, the client is not bound by the allegation of retainer in the petition, and may dispute the retainer: *In re Jones.* (1) Even where the order is obtained by the client, he may dispute the retainer as to particular items: *In re Frape* (*No.* 2). (2)

Norton, K.C. (*Van Neck* with him), for the solicitors, argued in support of the objection.

VAUGHAN WILLIAMS L.J. On the whole we think that the matters in respect of which the retainer is alleged are not sufficiently specifically mentioned to prevent the husband from denying the retainer with regard to the second divorce petition.

ROMER L.J. I desire to add that I wish to reserve to myself the right to consider the point whether, even in a case where the order for taxation is obtained by the solicitor, if the order contains a specific statement of a retainer in a particular transaction, and the client chooses to go in under that order, the client can dispute the retainer on the proceedings on the taxation. There are some observations in *In re Jones* (1) which seem to shew that he could. I only desire to say that I wish to keep that point open.

The appeal was then argued upon the merits.

Rowden, K.C., and *Montague Lush, K.C.* (*Sheldon* with them), for the husband. So long as alimony is punctually paid by the husband, the wife has no power to pledge her husband's credit after a decree for judicial separation. With regard to the costs of the second divorce petition, Warrington J. agreed with our contention that the second petition could not be treated as a continuation of the original divorce proceedings, but he proceeded upon the principle of *Turner* v. *Rookes* (3) and applied that to these costs. That case, which was decided under the law as it existed prior to the passing of the Matrimonial Causes Act, 1857, introduced an exception to the

(1) (1887) 36 Ch. D. 105. (2) [1894] 2 Ch. 290.
(3) 10 Ad. & E. 47; 50 R. R. 320.

C. A. 1904 WINGFIELD & BLEW (SOLICITORS), *In re.*

general rule as to the right of a separated wife to pledge her husband's credit—as to which see *Hunt* v. *De Blaquiere* (1), and the notes to *Manby* v. *Scott* (2)—in the case where the husband used such violence towards the wife that she was obliged to exhibit articles of the peace against him; but if instead of exhibiting articles of the peace against she indicted him, the exception did not apply: *Grindell* v. *Godmond.* (3) That exception does not apply to this case, first, because it is limited to the case of physical violence on the part of the husband; secondly, because the law is altered by s. 26 of the Matrimonial Causes Act, 1857. We put our case on the statute. Under s. 26 judicial separation and punctual payment of alimony absolutely put an end to the right of the wife to pledge her husband's credit. That section contains an exhaustive definition of the exemption of the husband. The costs of the alimony proceedings and the costs of the detinue action depend upon the same principle, and the husband cannot be made liable for any of those costs incurred after the date of the decree for judicial separation. Warrington J. allowed these costs on the ground that the retainer given to the solicitors was indivisible, and he relied on *Underwood, Son & Piper* v. *Lewis* (4) and *Court* v. *Berlin.* (5) No doubt a client may in his own favour insist that a solicitor who has undertaken the conduct of an action shall go through with it to the end, but it is submitted that a retainer is not indivisible in favour of the solicitor. This is not analogous to the case where the solicitor has no notice of withdrawal, for in this case the solicitors themselves obtained the judicial separation, which by the very terms of s. 26 operated as the termination of the wife's authority.

Further, there may be a question whether, in the case of parties married since the Married Women's Property Act, 1882, the rules of the Divorce Court as to the wife's costs of divorce proceedings are still operative: *Otway* v. *Otway.* (6)

(1) (1829) 5 Bing. 550; 30 R. R. 737.

(2) 2 Sm. L. C. 11th ed. pp. 446, 500.

(3) (1836) 5 Ad. & E. 755; 44 R. R. 573.

(4) [1894] 2 Q. B. 306.

(5) [1897] 2 Q. B. 396.

(6) (1888) 13 P. D. 141.

Norton, K.C., and *Van Neck*, for the solicitors. Sect. 26 distinguishes between the case where there is no alimony and the case where there is alimony decreed. In the former case the wife's agency ceases entirely; in the latter case her prior right to act as agent is not swept away, but the husband, so long as he punctually pays the alimony, is not liable in respect of the matters which the alimony covers. The result is that the exception established by *Turner* v. *Rookes* (1) still applies.

This exception goes to the costs of the second petition, for it was the misconduct of the husband which necessitated these costs, and therefore they cannot be treated as covered by the alimony. The solicitors are also entitled to the costs of the alimony proceedings, since they are part of the original divorce proceedings: *Harrison* v. *Harrison* (2); and for the costs of the detinue action, since there was no withdrawal by the husband of the retainer.

Montague Lush, K.C., in reply, cited *Ottaway* v. *Hamilton*. (3)

[COZENS-HARDY L.J. referred to *Gordon* v. *Gordon*. (4)]

VAUGHAN WILLIAMS L.J. I propose to deal with the three separate divisions of costs in question in this action one after the other. The first one I propose to deal with is the costs of the second petition. As to the costs of that petition, I cannot agree that the second petition was part and parcel of the first petition, so that the retainer of the solicitor to act in the first petition can be considered as a retainer of that solicitor to act in the second petition in such a sense that he would have been bound to go on with the second petition, unless for some good cause he could have determined his obligation under that retainer and have got rid of the retainer. I think that his retainer came to an end when the first petition was disposed of. I wish to say with respect to the conclusion which Warrington J. arrived at that he seems to have construed s. 26 of the Matrimonial Causes Act, 1857, as if that section, instead of defining the status of a wife after an order was made for

(1) 10 Ad. & E. 47; 50 R. R. 320.
(2) 13 P. D. 180.
(3) 3 C. P. D. 393.
(4) [1904] P. 163.

C. A. 1904 WINGFIELD & BLEW (SOLICITORS), *In re.* Vaughan Williams L.J.

judicial separation in the way in which it has done, had really put the wife exactly in the same position as she would have been in under the law prior to the passing of the Act. I do not think that that is the result of s. 26. I do not think, for instance, with respect to s. 26 that it could be said that after an order for judicial separation the authority of the wife to pledge her husband's credit continued in respect of necessaries which the alimony allowed could not have been supposed to cover. The words of the section are very strong. [His Lordship read the section.]

In my opinion the effect of that section is in every case of a judicial separation absolutely to do away with the right of the wife to pledge her husband's credit whilst she is so separated, and I think that it is not possible to limit that by saying that she is to have a right to pledge his credit in respect of some necessaries which become necessaries by reason of the husband's conduct towards her, as, for instance, by reason of his commencing proceedings for a dissolution of marriage.

With regard to the costs of the action of detinue as between the husband and wife, it seems to me that it being really admitted that at the time when that action was commenced the wife had the authority of her husband to retain the solicitor to act for her—I mean, not by reason of any express authority, but by reason of the relation of coverture which was then existing—the mere fact that the order for judicial separation was made did not bring that retainer to an end. I think that the retainer was for this purpose an indivisible retainer, and that it continued until the husband did something to bring it to an end. Mr. Lush says it was brought to an end by the judicial separation by reason of these words—"and her husband shall not be liable in respect of any engagement or contract she may have entered into." He wants us to go the length of saying that every contract which remained in fieri and was not fully performed, but which was of such a nature that the wife when she entered into it had authority to pledge her husband's credit by reason of the coverture, ceased to bind the husband from the moment that an order for judicial separation was made. I do not think that the words of that section involve

that proposition, and it is obviously one of such a nature that we should not so read the section unless the words were so plain as to make it clear that that was the intention of the Legislature. Having regard to the words "in every case of a judicial separation the wife shall, whilst so separated, be considered a feme sole," and reading the words "and her husband shall not be liable in respect of any engagement or contract she may have entered into" in connection with the words in the earlier part of the section, it appears to me that that section does not relieve the husband from liability in respect of contracts made on his account by his wife under her authority, which contracts were in existence and undetermined at the time of the judicial separation.

I have now only to deal with the costs so far as they relate to the getting and perfecting of the order for permanent alimony, which was a necessary consequence of the making, at the instance of the wife, of the order for judicial separation. I do not mean to say by necessary consequence that there was no discretion in the Court. There was a discretion, but at any rate it was the usual and ordinary consequence. It appears to me that we ought to treat these costs as covered by the original retainer given by the wife in the first divorce suit, and that they ought to be borne by the husband.

With regard to the suggestion that the order for judicial separation brought the liability of the husband to an end so soon as the order was made, I have nothing to add to what I have already said. I do not myself see that it is possible to suggest, so far as the case of *Harrison* v. *Harrison* (1) is concerned, that there is anything in the judgments of the Lords Justices on which such a proposition could be founded. As regards *Ottaway* v. *Hamilton* (2), to this extent I assent to what was said by Mr. Lush. I think there is more to be said in his favour upon that authority than there was upon the authority of *Harrison* v. *Harrison*. (1) Still, having carefully read through the portion of the judgment of Bramwell L.J. upon which he relied, I cannot see that those observations compel us to come to any such conclusion as he suggested, although they

(1) 13 P. D. 180. (2) 3 C. P. D. 393.

C. A. 1904 WINGFIELD & BLEW (SOLICITORS), *In re.*

are not so inconsistent with it as the judgments in *Harrison* v. *Harrison*. (1) I think that the order of Warrington J. must be modified in the way I have mentioned.

ROMER L.J. I also have come to the conclusion that the judgment of Warrington J. was right except in respect to the question of the costs of the second divorce proceedings. I differ from him there because I come to a different conclusion as to the true effect of s. 26 of the Act of 1857. In the first place, as a matter of fact I think that it cannot be properly said that the second divorce proceedings could be regarded as really a continuation or part of the original divorce proceedings. I think that the second divorce petition presented by the husband must be regarded as a distinct proceeding on his part—one which would not be covered by the original retainer given by him through his wife's implied agency in the case of the original petition. That being so, we have to consider what is the effect of s. 26 of the Act upon the position of the wife in respect of that second petition. Now when that second petition was presented the wife had obtained a decree for judicial separation. Upon the construction of s. 26 I myself do not feel any difficulty. I think that the first part of the section is clear in this, that it takes away from and after the time of judicial separation all right and power on the part of the wife to pledge her husband's credit or to contract on behalf of her husband. The second part of the section merely gives the wife power to make the husband liable for necessaries in a special case, that case being where upon a judicial separation alimony has been decreed to be paid and the husband has not duly paid it. That construction of the section is fatal to the wife in respect of the costs of the second petition, because she cannot allege, in order to justify her retainer of the solicitor on behalf of the husband, that she had his implied authority under the section, inasmuch as the husband had in fact duly paid the alimony which he had been ordered to pay. Therefore she did not fall within the exception in the second part, and her general agency was wholly taken away by the first

(1) 13 P. D. 180.

part. As the point has been argued and may have a bearing on other parts of this case, I should also like to add that the words in the first part of the section, "in respect of any engagement or contract she may have entered into," are in my opinion intended to be governed by the words "whilst so separated" at the beginning of the section. It is to be noted that the section commences by saying that "in every case of a judicial separation the wife shall, whilst so separated, be considered a feme sole," and the section is not intended to cover any question and is not considering any question of what had been done by the wife before judicial separation. I think that the true construction of the whole section is that it is only considering the rights and powers of the wife after judicial separation has been awarded and during the period of judicial separation. That decides the only point upon which I differ from Warrington J.

As to the other points I may be brief.

First, as to the costs of the detinue action. In my opinion, for the purpose of the question which we have to consider here, there can be no true distinction between the case of an implied authority given by the husband to the wife to retain a solicitor and the case where the husband had expressly given her authority to retain a solicitor, and the wife had so retained him. Now in that case the solicitor starts with having authority to prosecute this detinue action on behalf of the wife, but on the retainer of the husband. He is bound to prosecute the action on that retainer, and is certainly entitled to do it on the authority and liability of the husband, at any rate until his retainer is withdrawn. Now in the present case there was no withdrawal by the husband of the retainer. The solicitor therefore was bound, or at least entitled, to go on with the action on behalf of the wife, as he did, unless indeed it could be said that, he having had notice of the judicial separation, that was equivalent to the husband giving him express notice of withdrawal. In my opinion that notice cannot have that effect. It is quite conceivable that notwithstanding the judicial separation the husband may have wished that action to be properly conducted to a conclusion by the

C. A. 1904 WINGFIELD & BLEW (SOLICITORS), *In re.* Romer L.J.

wife, and by means of a solicitor acting on his credit. It may well be that the husband might have thought that the wife had not sufficient means to conduct such an action satisfactorily, and was quite willing that the solicitor should continue to act for the wife. For this and perhaps for other reasons I am satisfied that mere notice of judicial separation, even with notice of what the general effect of this separation is under s. 26 upon the position of the wife, would not affect the operation of the retainer which was given before the judicial separation, the operation of that retainer not coming within the provisions of s. 26 at all. Therefore I think that the judge came to a right conclusion as to that. I need not consider whether the husband could have even intervened by express notice of withdrawal of retainer in such a case as this, where the solicitor had been originally instructed and retained by the husband to conduct proceedings of the wife against the husband, and those proceedings were still pending. That is a question which I will reserve for consideration when it arises.

Lastly, as to the costs of the proceedings for alimony. I agree in thinking there is more difficulty as to that point, but I think that those proceedings are covered by the proceedings under the first petition for divorce. I think that they may be fairly considered as part of the ordinary proceedings in a divorce suit such as this was—necessary in order to complete the proceedings, and falling within the contemplation of any party to such a suit who gives a retainer to a solicitor to act, and who does not expressly withdraw his retainer pending the proceedings. I think that the alimony proceedings may be fairly considered to be necessary and proper proceedings, and to be part of the general proceedings on a divorce petition—that is to say, proceedings which the solicitor would be bound or at least entitled to conduct without a fresh retainer. Therefore the costs of the alimony proceedings are governed by the same principle as the costs of the detinue action.

COZENS-HARDY L.J. I agree. I start with the admission that the husband cannot dispute the original retainer in the

first divorce suit and in the detinue action. He has paid, or has expressed his willingness to pay, solicitor and client costs up to the date of judicial separation on that footing. It may be that he might have denied the retainer at an early stage of the divorce proceedings, and might have relied on the change in the law introduced by the Married Women's Property Act, 1882. It is not necessary to express, and I do not express, any opinion as to that.

There are three points to be considered.

First, as to the costs of the first divorce petition after the order for judicial separation. The suit was not finally ended by that decree. The divorce proceedings were of this nature. The husband commenced proceedings in the Divorce Court, claiming a divorce on the ground of adultery. The wife by her defence claimed judicial separation according to the provisions of the Act of Parliament on the ground of cruelty, and before the case came on she obtained an order for alimony pendente lite, and that alimony was subsequently increased; but no permanent alimony was obtained until a much later date. It appears to me that all these proceedings in respect of alimony which were taken either under s. 24 or under s. 32 of the Matrimonial Causes Act of 1857 ought properly to be regarded as proceedings in the first divorce suit—proceedings which were reasonably in contemplation of the parties when the admitted retainer was given to the solicitor to act for the wife in that suit. That would be my impression if there were no authority on the point; but when we consider the case of *Harrison* v. *Harrison* (1), although it may be said, and said with truth, that as the husband was not a party to those proceedings it was not an absolute decision, still it is impossible to read the judgments of the three learned judges in that case without seeing that the whole foundation of the order refusing the solicitor a charge on the wife's property for his costs was that he had a right to proceed against the husband to recover the costs incurred in that case after the order absolute, but on the footing of a retainer granted at the beginning of the divorce suit; and the recent decision of *Gordon* v. *Gordon* (2) really proceeds on

(1) 13 P. D. 180. (2) [1904] P. 163.

C. A. 1904 WINGFIELD & BLEW (SOLICITORS), *In re.* Cozens-Hardy L.J.

the same footing and involves the same principle. Therefore I think that Warrington J. was quite right in saying that the husband is liable for all the steps up to the order for permanent alimony in the first divorce proceedings.

With regard to the action of detinue, that is a much plainer and easier case than the other. It is a simple case of an indivisible retainer not withdrawn by any act of the husband. It is said that inasmuch as the solicitor had notice of the order for judicial separation, which would prevent the wife from giving a new retainer, that notice ought to be treated as equivalent to a withdrawal of the old retainer. I cannot follow that. When once a good retainer has been given at the commencement of an action, something definite, clear, and precise is required to withdraw that retainer and to get rid of the indivisible effect of that retainer.

As to the third point, I cannot agree with Warrington J. I think that he was influenced by s. 16 of the Act of 1857, which says that a sentence of judicial separation "shall have the effect of a divorce a mensâ et thoro under the existing law"; although it goes on to say, "and such other legal effect as herein mentioned"; and that he applied in the consideration of this case the old authorities which held that, where a divorce a mensâ et thoro had been granted and alimony had been allowed, that alimony was only a provision for such necessaries as were reasonably in the contemplation of the parties or of the Court, and did not prevent the wife from entering into a contract for necessaries in respect of a matter which was not within the contemplation of the parties or within the scope of the alimony which was allowed. The difficulty I feel is that s. 26 appears to me to cut away and destroy the foundation of that limitation. The language of the section is too strong. It expressly enacts, with one exception only, that in every case of a judicial separation the wife shall, whilst so separated, be considered as a feme sole, and the husband shall not be liable in respect of any engagement or contract she may have entered into, as I read it, whilst the judicial separation shall continue. That being so, it appears to me that the old authorities have nothing to do with the

C. A. 1904 WINGFIELD & BLEW (SOLICITORS), *In re*. Cozens-Hardy L.J.

matter. The proviso at the end of the section cannot help the wife, because it is admitted that the husband has paid the alimony which he was ordered to pay. He is not, therefore, liable within the exception, and he is expressly exempt under the first part of s. 26. I think that the decision of Warrington J. was entirely right except as to this one point, but as to that the order must be amended. There will be no costs here or below.

Solicitors: *Wingfield & Blew; J. Mitchell, for R. A. Willcock & Taylor, Wolverhampton.*

H. B. H.

C. A. 1904 *June* 14, 15, 16, 17; *Aug.* 9.

In re BOWLBY. BOWLBY *v.* BOWLBY.

[1903 B. 3086.]

Infant—Maintenance—Contingent Legacy by Father to Child—Contingent Life Interest—Settled Legacy—Right to Surplus Income and Accumulations—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 43, *sub-s.* 2.

A testator by his will, dated June 17, 1898, bequeathed to each of his daughters who should attain twenty-one the sum of 50,000*l.*; provided that the legacy should not vest absolutely in her, but should be retained by his trustees and held by them upon trust to pay the income to the daughter for her life, and after her death upon trusts for her children and remoter issue. And the testator authorized his trustees to appropriate any part of his personal estate in or towards satisfaction of any legacy given by his will. And he directed that immediately after his death his trustees should take such steps as should be requisite to make his children who were then under twenty-one wards of Court, and that "notwithstanding anything hereinbefore contained, all powers, whether statutory or otherwise, as to the education, maintenance, or advancement" of his children or any of them should be exercised by his trustees only under the direction of the Court.

The testator died on November 4, 1902. He left four daughters, all of whom were at his death under twenty-one. On January 6, 1903, the trustees appropriated in satisfaction of each of the legacies of 50,000*l.* a sum of 53,547*l.* 10*s.* 6*d.* Consols. On February 9, 1903, an order was made by Joyce J. that a sum of 1000*l.* per annum should be allowed out of the income of the Consols appropriated to the legacy of the eldest

C. A.
1904
BOWLBY, *In re.*
BOWLBY *v.* BOWLBY.

daughter for her maintenance during her minority. She attained twenty-one on July 13, 1903.

Upon a summons taken out by the trustees to determine who was then entitled to the unapplied income and the accumulations thereof:—

Held, that the unapplied income and the accumulations thereof formed an accretion to the capital, and that the daughter was entitled only to the interest on them for her life.

Decision of Joyce J., founded on that of Buckley J. in *In re Scott*, [1902] 1 Ch. 918, reversed.

In re Scott disapproved.

Sect. 43, sub-s. 2, of the Conveyancing Act, 1881, provides that the trustees of property held in trust for an infant contingently on his attaining twenty-one shall hold the accumulations of the residue of the income (beyond that which is applied for the infant's maintenance) "for the benefit of the person who ultimately becomes entitled to the property from which the same arise":—

Held, that those words mean "the property the income arising from which has been accumulated," so that if the contingent legacy is settled the tenant for life is, on the happening of the contingency, entitled only to the interest during his life of the amount of the surplus income and accumulations thereof, that amount forming an accretion to the original legacy.

According to the practice of the Court of Chancery, an infant child, who is under the will of his parent entitled to a legacy contingently on his attaining twenty-one, is entitled to maintenance during his minority out of the income of the legacy.

But, though it has been said that the legacy in such a case bears interest from the testator's death, the legacy is not the less a contingent one, and the infant does not acquire an immediate vested interest in the income, and if he dies under twenty-one the surplus income not applied for maintenance does not pass to the infant's representatives.

And if the legacy is settled in trust for the infant for life, with remainders over, the surplus income forms an accretion to the capital, and the infant on attaining twenty-one is entitled only to the income thereof during his life.

Per Cozens-Hardy L.J.: Until a fund had been appropriated by the trustees in satisfaction of the contingent legacy, s. 43, sub-s. 2, had strictly no application, because until then it could not be said that any "property" was held by the trustees in trust for the infant legatee, though she was entitled to maintenance out of the income during minority.

APPEAL from a decision of Joyce J., the question being to whom the surplus income of a legacy given to a child of the testator at twenty-one, after allowing for maintenance during minority, belonged, the child having attained twenty-one.

Edwin Salvin Bowlby, by his will dated June 17, 1898 (inter alia), bequeathed to each of his sons (other than A. S. Bowlby,

his eldest son) "who should attain the age of twenty-five years" the sum of 50,000*l.* And the testator declared that "my trustees may apply the whole or such part as they in their discretion shall think fit of the income of the legacy of 50,000*l.* hereinbefore given to each of my sons (other than the said A. S. Bowlby) for or towards his maintenance, education, or benefit during such time as such son shall be under the age of twenty-five years," and that the trustees should during the suspense of absolute vesting of such legacy accumulate the surplus (if any) of the income thereof by investing the same and the resulting income thereof in augmentation and so as to follow the destination of the legacy from which the same should have proceeded; but with power to apply any such accumulations in any subsequent year for or towards the maintenance, education, or benefit of such son of his in the same manner as such accumulations might have been applied had they been income arising from the original legacy in the then current year. The trust for accumulation was to cease at the end of twenty years from the testator's death in case any such son should not then have attained a vested interest in his legacy. And the testator bequeathed to each of his daughters who should attain the age of twenty-one years or marry with the consent (if marrying after his death) of her guardian or guardians the sum of 50,000*l.*, "Provided that the legacy of 50,000*l.* hereinbefore given to each daughter of mine who shall attain the age of twenty-one years or marry with such consent as aforesaid shall not vest absolutely in her, but shall be retained by my trustees and held by them upon the trusts hereinafter declared concerning the same." The trustees were to invest the legacy and to pay the income to the daughter for her life, for her separate use without power of anticipation, and after her death upon trusts for her children or remoter issue as she should by deed or will appoint, and, in default of and subject to any such appointment, in trust for all or any the children or child of such daughter who being sons or a son should attain twenty-one, or being daughters or a daughter should attain that age or marry, if more than one in equal shares. And the testator authorized his trustees at any time or times and at

C. A. 1904 BOWLBY, *In re.* BOWLBY *v.* BOWLBY

their discretion to appropriate any part of his personal estate in its then actual condition or state of investment in or towards satisfaction of any legacy given by his will or by any codicil thereto, with power for that purpose conclusively to determine the value of such part of his estate in such manner as they should think fit, and after such part of his estate should have been so appropriated the testator declared that his residuary estate, as well real as personal, should be discharged from the said legacy to the extent of the value as determined by his trustees under this power of the part of his estate so appropriated. And the testator devised and bequeathed all the rest and residue of his personal estate and all his real estate not thereby otherwise disposed of unto and to the use of his son A. S. Bowlby, his heirs, executors, administrators, and assigns respectively. And the testator directed that immediately after his death his trustees should take such steps as should be requisite in order that all children of his who should not have attained the age of twenty-one years on the day of his death might be declared wards of the Chancery Division, and that, "notwithstanding anything hereinbefore contained, all powers, whether statutory or otherwise, as to the education, maintenance, or advancement of such children or any of them while minors shall be exercised by my trustees only under the direction of the said Court."

The testator appointed his son A. S. Bowlby, his half-brother T. W. S. Bowlby, and his nephew H. R. Wilson executors and trustees of his will.

The testator died on November 4, 1902. He left surviving him his eldest son A. S. Bowlby, who had attained twenty-one, and four daughters and three younger sons, all of whom were at the date of their father's death under twenty-one.

On January 6, 1903, the trustees, under the power contained in the will, appropriated in satisfaction of each of the legacies of 50,000*l.* to the four daughters and the three younger sons the sum of 53,547*l.* 10*s.* 6*d.* Consols.

On February 9, 1903, an order was made by Joyce J. that a sum of 1000*l.* per annum be allowed out of the income of the legacy to the eldest daughter, Eva Mary S. Bowlby, for her

maintenance from February 4, 1903, and for the time to come during her minority, or until further order, and other sums were allowed for the maintenance of the other infant children respectively.

Eva Mary attained twenty-one on July 13, 1903.

On July 21, 1903, an originating summons was taken out, by the trustees as plaintiffs against Eva Mary S. Bowlby as defendant, for the determination of the question whether the unapplied income accrued during the minority of the defendant of the legacy of 50,000*l.* to which she was entitled and the accumulations thereof should be paid and transferred to her, or whether they should be retained by the trustees upon the trusts declared by the will of the capital of the said legacy.

Joyce J., contrary to his own view, was of opinion that, by reason of the decision of Buckley J. in *In re Scott* (1), he was bound to hold that the unapplied income and the accumulations belonged to the defendant, and made a declaration accordingly.

The plaintiffs appealed, and by their notice of appeal asked that it might be declared that the unapplied income and accumulations ought to be retained by the plaintiffs, and held upon the trusts declared by the will of the legacy of 50,000*l.*

Vaughan Hawkins, for the appellants. This, though in form an appeal from a decision of Joyce J., is really brought for the purpose of asking the Court to review the decision of Buckley J. in *In re Scott* (1), which Joyce J. followed. The question is, to whom does the surplus income, beyond that which has been applied for the maintenance of the infant, belong? It is submitted that that surplus is an accessory or accretion to the capital—that it should be invested as capital, and only the income of it paid to the tenant for life. Buckley J. held in *In re Scott* (1) that the whole surplus belonged to the tenant for life. It is contended both on the construction of s. 43 of the Conveyancing Act, 1881, and apart from that Act that the infant tenant for life on attaining twenty-one takes only a life interest in the surplus income accrued during her minority.

(1) [1902] 1 Ch. 918.

C. A. 1904 BOWLBY, *In re.* BOWLBY *v.* BOWLBY.

That this was so before the Act is shewn by *Hodgson* v. *Earl of Bective.* (1) In *In re Wells* (2), on which Buckley J. relied, the gift to the infant was vested, not contingent on attaining twenty-one. And that was also the case in *In re Humphreys.* (3) It is suggested that here the child has a vested interest in the income, and that there is nothing to take it away. But the rule is that an infant is only entitled to maintenance, or something in the nature of maintenance—to a portion of the income: Williams on Executors, 9th ed. pp. 1285 et seq.; Roper on Legacies, 4th ed. vol. ii. cap. xx. sect. 4, pp. 1257 et seq. On the appropriation of a fund to answer a legacy the whole income becomes attached to the capital. In the present case the trustees appropriated Consols to answer the four legacies. The effect of the appropriation was to make the income accessory to the capital. The rule as to the income of an appropriated fund is not the same as it was when the old cases *Wyndham* v. *Wyndham* (4) and *Shawe* v. *Cunliffe* (5) were decided. It is now settled that in such a case the intermediate income goes to the person who becomes entitled to the capital: *In re Medlock* (6); *In re Clements* (7); *In re Woodin.* (8) The old law before the Conveyancing Act, 1881, s. 43, was, in the case of a contingent legacy given by a parent, or a person in loco parentis, to allow interest to the infant by way of maintenance, but not to give the infant the surplus income on his attaining twenty-one: Williams on Executors, 9th ed. p. 1291; *Harvey* v. *Harvey* (9); *Chambers* v. *Goldwin* (10); *Brown* v. *Temperley* (11); *Martin* v. *Martin.* (12)

[VAUGHAN WILLIAMS L.J. referred to *Butler* v. *Butler.* (13)]

[*Countess of Bective* v. *Hodgson* (14) was also referred to.]

Rowden, K.C., and *P. F. Stokes*, for the daughter. Apart from the statute, the rule of law is well established that a con-

(1) (1863) 1 H. & M. 376.
(2) (1889) 43 Ch. D. 281.
(3) [1893] 3 Ch. 1.
(4) (1789) 3 Bro. C. C. 58.
(5) (1792) 4 Bro. C. C. 144.
(6) (1886) 55 L. J. (Ch.) 738.
(7) [1894] 1 Ch. 665.
(8) [1895] 2 Ch. 309.
(9) (1722) 2 P. Wms. 21.
(10) (1805) 11 Ves. 1; 8 R. R. 61.
(11) (1827) 3 Russ. 263.
(12) (1866) L. R. 1 Eq. 369.
(13) (1743) 3 Atk. 58.
(14) (1864) 10 H. L. C. 656.

tingent legacy by a parent or one standing in loco parentis to a child carries interest, unless the testator has provided another fund for the maintenance of the infant. The rule is correctly stated in Carson's Real Property Statutes, note, p. 590; Simpson on Infants, 2nd ed. p. 267.

[COZENS-HARDY L.J. referred to *Hanson* v. *Graham.* (1)]

In re George (2) states the rule in the same way.

[ROMER L.J. The principle of the decision in *In re George* (2) is against you.]

In *In re Wells* (3) it was held that, as regarded the accumulations which had arisen from the income of a share of residue, the tenant for life was the person who had ultimately become entitled within the meaning of s. 43, sub-s. 2, of the Conveyancing Act, 1881. *In re Wells* (3) was approved by the Court of Appeal in *In re Humphreys* (4), in which there was an immediate vested life interest in a granddaughter in a share of residue, with remainder to her children. There is no distinction between a contingent legacy of corpus and a contingent legacy of income. "Property" in s. 43 is not confined to corpus; "property" refers equally well to the income fund, and the person "who ultimately becomes entitled to" that is the person for the time being entitled, as in the present case the infant. *In re Scott* (5) gives the right interpretation to this sub-section. The present case is not merely a question of maintenance: it is the case of a contingent legacy to a child carrying interest. *Heath* v. *Perry* (6) and *Hearle* v. *Greenbank* (7) are distinguishable.

[Theobald on Wills, 5th ed. pp. 167 and 168, and *Donovan* v. *Needham* (8) were also cited.]

In re Moody (9) shews that, even though s. 43 of the Conveyancing Act, 1881, ought to be read as part of the will, still it does not displace the application of the general rule that legacies to infant children carry interest from the death of the testator.

(1) (1801) 6 Ves. 239, 245, 249; 5 R. R. 277.
(2) (1877) 5 Ch. D. 837.
(3) 43 Ch. D. 281.
(4) [1893] 3 Ch. 1.
(5) [1902] 1 Ch. 918.
(6) (1744) 3 Atk. 101.
(7) (1749) 3 Atk. 695.
(8) (1846) 9 Beav. 164.
(9) [1895] 1 Ch. 101.

C. A. 1904 BOWLBY, *In re.* BOWLBY *v.* BOWLBY.

[COZENS-HARDY L.J. referred to *Ellis* v. *Ellis*. (1)]

Vaughan Hawkins, in reply. It is conceded that a contingent legacy to a child carries some interest, but the quantum of interest has to be determined by the Court when maintenance is applied for.

The respondent's case is mainly based on *In re Scott*. (2) It is said the infant had an absolute vested interest in the whole of the income from the time of the setting apart of the fund, and that this was a contingent interest within the meaning of s. 43, sub-s. 1, of the Conveyancing Act, 1881. It is said that by the rule of equity an infant has a right to the whole of the income of a fund appropriated to answer a contingent legacy, or at any rate that the infant is entitled to 4 per cent. during his life.

It is submitted that the so-called rule of equity has been superseded by the statutory enactment which gives to all infants a right to maintenance out of the income of a contingent legacy.

[VAUGHAN WILLIAMS L.J. Was there not independently of the statute a distinction between a child of the testator and a stranger? A different construction was put upon identical words, because the Court would not assume that a father intended to evade his obligation to provide for his child.]

In the case of a gift of residue the Court gave only maintenance out of the income of the residue.

[COZENS-HARDY L.J. referred to *Pett* v. *Fellows*. (3)]

The decision there was based on other grounds than the relation of father and child.

[COZENS-HARDY L.J. referred to *Martin* v. *Martin*. (4)]

In *Chambers* v. *Goldwin* (5) only "reasonable" maintenance was allowed for a daughter, who had married at eighteen, until she attained twenty-one.

[VAUGHAN WILLIAMS L.J. In *Martin* v. *Martin* (4) Wood V.-C. allowed an infant maintenance by way of interest on a contingent legacy.]

(1) (1802) 1 Sch. & Lef. 1.
(2) [1902] 1 Ch. 918.
(3) (1733) 1 Swans. 561, n.
(4) L. R. 1 Eq. 369.
(5) 11 Ves. 1; 8 R. R. 61.

There is nothing in the older cases which shews that a child is entitled to full interest; the right is only to maintenance.

[*P. S. Stokes* referred to *In re Moody.* (1)]

[COZENS-HARDY L.J. In the later cases, I think, the form adopted has been a declaration that the legacy carries interest.

VAUGHAN WILLIAMS L.J. referred to *Wynch* v. *Wynch.* (2)]

It is submitted that maintenance is always given.

[ROMER L.J. We have seen the registrar's book, from which it appears that in *Chambers* v. *Goldwin* (3) 350*l.* a year was allowed (not full interest on the legacy) for the past maintenance of the daughter.]

At the time when the old cases were decided the Court of Chancery exercised a very wide discretion. But still the basis of the rule was maintenance of the infant.

[COZENS-HARDY L.J. In *Martin* v. *Martin* (4) the registrar's book shews that the Vice-Chancellor made a declaration that the legacy carried interest at 4 per cent. from the time when the infant attained fifteen until he attained twenty-one.]

It is submitted that the old rule was that an infant was not entitled to more than an allowance for his maintenance until he attains twenty-one. Still the Court may not have been precluded from allowing full interest. The Court might allow one of three things: (1.) full interest, (2.) reduced interest, or (3.) maintenance.

[COZENS-HARDY L.J. Has the Court ever adopted the second course since the statutory provision was made?]

Apparently not.

The ordinary practice was to allow 4 per cent. interest on the legacy, but not necessarily to apply the whole of the interest to maintenance: *Harvey* v. *Harvey* (5); *Chambers* v. *Goldwin* (3); *Brown* v. *Temperley.* (6) The Court has a discretion (though not an arbitrary one) as to the maintenance.

[VAUGHAN WILLIAMS L.J. If a legacy were given by a father to a child contingently on the child attaining twenty-one, and there was a gift over of the principal and interest in

(1) [1895] 1 Ch. 101.
(2) (1788) 1 Cox, 433.
(3) 11 Ves. 1; 8 R. R. 61.
(4) L. R. 1 Eq. 369.
(5) 2 P. Wms. 21.
(6) 3 Russ. 263.

C. A. 1904 BOWLBY, *In re.* BOWLBY *v.* BOWLBY.

case the child should not attain twenty-one, would not the presumption that a father intends to provide for the maintenance of his child during minority be inapplicable in such a case? Does not this shew that the question is one of construction?]

In *Mole* v. *Mole* (1) a father gave the residue of his estate to his infant child on her attaining twenty-one, the interest to accumulate, saying nothing as to maintenance, and there was a gift over in case the infant should not attain twenty-one. It was held that the infant was entitled to maintenance from the death of her father.

[ROMER L.J. referred to *In re Clements*. (2) That case was dealt with wholly under the power given by s. 43 of the Conveyancing Act, 1881.

COZENS-HARDY L.J. referred to Roper on Legacies, 3rd ed. vol. ii. cap. xx. sects. 4, 5, 6.

VAUGHAN WILLIAMS L.J. In Williams on Executors, 9th ed. p. 1287, it is said that "in the case of a legacy given to a child by a parent, or one in loco parentis, whether by way of portion or not, the Court will give interest *from the death*, to create a provision for its maintenance"; and *Beckford* v. *Tobin* (3) and *Crickett* v. *Dolby* (4) are referred to.]

In Roper on Legacies, 3rd ed. vol. ii. p. 293, the rule is treated as settled. In the case of a gift of residue it has never been suggested that the Court is bound to give full interest. *Brown* v. *Temperley* (5) shews that there is a right to maintenance *out of* the income, not a right to the whole income; or, at any rate, that the Court has a discretion as to the amount of the maintenance. The leading authority is *Chambers* v. *Goldwin* (6), and the decision in *Martin* v. *Martin* (7) was founded upon it.

[COZENS-HARDY L.J. *Pett* v. *Fellows* (8) seems to be against you.]

That case is only shortly reported, and the whole of the will is not stated.

(1) (1758) 1 Dick. 310.
(2) [1894] 1 Ch. 665.
(3) (1749) 1 Ves. Sen. 308, 310.
(4) (1795) 3 Ves. 10, 13.
(5) 3 Russ. 263.
(6) 11 Ves. 1; 8 R. R. 61.
(7) L. R. 1 Eq. 369.
(8) 1 Swans. 561, n.

In the present case the testator has relied on the statutory power, which is in effect incorporated in the will.

[COZENS-HARDY L.J. Would the statute apply before appropriation?]

It is submitted that it would. There is a provision in the will for the maintenance of the younger sons. Nothing is said about the maintenance of the daughters except in the clause which incorporates the statutory provisions. It is submitted that s. 43 applies before the appropriation of a contingent legacy. If s. 43 does not apply till after appropriation, then *Chambers* v. *Goldwin* (1) applies.

[COZENS-HARDY L.J. *Wynch* v. *Wynch* (2) seems to shew that the ordinary rule of law is excluded only when provision for maintenance is made from another fund.]

In re Moody. (3) The rule is excluded if maintenance, however small its amount, is provided for the child: *Ellis* v. *Ellis* (4); and here maintenance is provided by reference to the statute.

Cur. adv. vult.

Aug. 9. The following judgments were read:—

VAUGHAN WILLIAMS L.J. Before dealing with the question what is the established rule of construction of wills of parents who leave legacies to children, whether vested, but payable at a future time, or contingent, but making no provision, outside the legacy, for the maintenance of the child between the death of the testator and the date when the legacy becomes payable, I will deal with the question whether s. 43 of the Conveyancing Act, 1881, is applicable in the facts of this case, and what is its effect, if applicable, and in particular with the question whether the decision of Buckley J. in *In re Scott* (5) ought to be followed.

I do not think that, having regard to the decision in *In re Dickson* (6), s. 43 of the Conveyancing Act, 1881, applies to the facts of the present case—that is to say, because the infant

(1) 11 Ves. 1; 8 R. R. 61.
(2) 1 Cox, 433.
(3) [1895] 1 Ch. 101.
(4) 1 Sch. & Lef. 1.
(5) [1902] 1 Ch. 918.
(6) (1885) 29 Ch. D. 331.

C. A. 1904 BOWLBY, *In re.* BOWLBY *v.* BOWLBY. Vaughan Williams L.J.

daughter Eva Bowlby is not, under her father's will, entitled even contingently to the intermediate income of the 50,000*l.* left to her by her father. Under her father's will she may, at the age of twenty-one, become entitled in possession to a life estate in the 50,000*l.*, with its accretion by the addition to the capital of the accumulations arising from the surplus income after providing maintenance; but she can never take the intermediate income as her property, or, if she can so take, the application of s. 43 is excluded by the will expressing a contrary intention within the meaning of sub-s. 3 of that section, for, if by the will the intermediate income is her property, held for her by the trustees, it cannot be that it is to accumulate for the benefit of the person who ultimately becomes entitled to the property (i.e., the capital) from which the accumulations arise. The only way in which the section can apply is, if it is construed as Buckley J. construed it in *In re Scott* (1), and read, as that learned judge did, the word "property" in sub-s. 2 of s. 43 as meaning either corpus or income, as the nature of the gift may require. If this construction is adopted, the application of the section will not be excluded by a contrary intention within the meaning of sub-s. 3 of s. 43.

I have, however, great difficulty in adopting Buckley J.'s construction of s. 43, because, as is pointed out by Messrs. Hood and Challis in their book on the Conveyancing and Settled Land Acts, 6th ed. p. 123, to hold that "the word 'property' might not mean capital exclusively, attributes to the Act an intolerable degree of looseness in the use of language." Secondly, because of the cases which have been relied on as supporting this view. *In re Wells* (2) is a case in which the child took a vested interest; and *In re Humphreys* (3) is a case in which the Court held that by implication there was a gift of an immediate life interest.

It is, however, to be observed that Lindley L.J. at the end of his judgment in *In re Humphreys* (4) did give some countenance to the suggested construction of the word "property" in clause 2, for he said: "With respect to the case of *In re*

(1) [1902] 1 Ch. 918.
(2) 43 Ch. D. 281, 286.
(3) [1893] 3 Ch. 1.
(4) [1893] 3 Ch. 7.

Wells (1), which we were asked to overrule, I am of opinion that the decision was correct having regard to the terms of the will and to sub-s. 3 of s. 43 of the Conveyancing Act, 1881, which in that case, as well as in this, excluded sub-s. 2. It may be that the result, which I think it safer to arrive at by the aid of sub-s. 3, can be reached without the aid of that sub-section by construing sub-s. 2 as suggested by North J., when that sub-section has to be applied to the case of a tenant for life becoming absolutely entitled to the income in possession. I have some doubt about this, but I desire to leave the point open until the necessity for deciding it arises."

As to the suggestion that, assuming s. 43 not to apply, the clause of the will which requires that "all powers, whether statutory or otherwise, as to the maintenance, education, or advancement" of the children while minors shall be exercised by the trustees only under the direction of the Court amounts to a testamentary direction that s. 43 shall apply, I cannot agree.

It seems to me that, if s. 43 applies by force of the statute, there is no need for words to that effect in the will; and if, on the other hand, s. 43 does not apply, the clause above cited will not make it do so, because, ex hypothesi, there is no statutory power.

I propose now to deal with the question of the general law under which the will of a father giving a legacy to a child, either not payable till a future date, or contingent on the happening of a future event, is so construed as to make a provision for the child's maintenance by making the child's legacy carry interest. There can, to my mind, be no doubt but that the language used in the cases in which this canon of construction was first established is language apt for the gift to the child legatee of interest on the legacy payable in futuro or contingently during the interval between the parent's death and the arrival of the time or the happening of the event on which the legacy is made payable. Thus in *Green* v. *Belchier* (2) Lord Hardwicke said: "In such a case interest by way of maintenance would certainly be allowable in the

(1) 43 Ch. D. 281, 286. (2) (1737) 1 Atk. 505, 507.

C. A. 1904 BOWLBY, *In re.* BOWLBY *v.* BOWLBY. Vaughan Williams L.J.

meantime; it being a constant rule in equity, that wherever a legacy is given by a father to a child, as a provision for such child, though the legacy be payable at a future day, yet the child has an immediate right to the interest of the money; if the legatee was a stranger to the testator, it would be otherwise." The words in *Beckford* v. *Tobin* (1) and *Crickett* v. *Dolby* (2) are all of a similar character.

The child's legacy is said to bear interest or carry interest. It will be found that this sort of phraseology is used equally in modern cases. Take, for example, *In re George* (3), in which James L.J. said: "But the rule of law is well established that a contingent legacy does not carry interest while it is in suspense, except in the case of a legacy by a parent or one standing in loco parentis to the legatee; and that exception is subject to another exception, that the rule giving interest to the child does not take effect when the testator has provided another fund for his maintenance, so that the income of the legacy is supposed not to be required for the purpose."

It will be observed that in none of these cases is the statement made that the presence in the will of a gift in futuro by a parent to a child gives the child during infancy a right to an allowance for maintenance out of the testator's estate; on the contrary, the statement invariably is that the legacy in such a case should bear interest during a period before it becomes payable. I think it can hardly be doubted but that the reason why Courts of Equity, deeming it impossible that a father who made a future provision for a child should intend the child to starve until the legacy fell in, gave effect to the father's presumed intention to provide for the maintenance of his child, by construing the will as directing that the future legacy should bear interest before it became payable, rather than by finding in the will an implied direction that the child should receive reasonable maintenance out of the residue of the testator's estate, was that the Courts wished to avoid the appearance of affirming a common law right in children to maintenance during infancy independently of the father's

(1) 1 Ves. Sen. 308. (2) 3 Ves. 10.
(3) 5 Ch. D. 837, 843.

intention as expressed in his will, and also desired, by making the maintenance payable out of interest on a legacy contingently coming to the child, to provide for the child out of the fruit of a fund which contingently was to come to the child, because to do this seemed to be to do less violence to the provisions of the will than simply to order maintenance to be paid out of the residue of the parent's estate. Primâ facie maintenance ought only to be ordered out of the property of the child; to construe the will as giving the child at once, not contingently, interest for maintenance complies with this primâ facie rule.

Now the logical consequence of this view would be that, so long as the child lived, pending the interval between the father's death and the child attaining twenty-one, the child would be entitled to the whole of the interest, although it was for the Court to determine whether the whole or what lesser sum should be allowed for maintenance. It does not seem to me that the practice of the Court in fixing the amount to be allowed for maintenance negatives the right of the child to the whole interest, because the order of the Court, fixing the amount to be paid from time to time for maintenance, was necessary, not from anything to be implied on a proper construction of the father's will, but from the inability of the child or its guardian to give to the executors or trustees a valid receipt or discharge.

It is said that the dictum of Sir W. Grant in *Hanson* v. *Graham* (1) is an authority for the proposition that "what is not taken out of the fund for maintenance must follow the fate of the principal"; and it is said that *Leake* v. *Robinson* (2), a decision by the same judge, leads to the same conclusion. Those, however, are both cases in which there was an express direction for maintenance. In *Hanson* v. *Graham* (1) the legacy to grandchildren of the testator was a legacy of 500*l.* apiece 4 per cent. Consolidated Bank Annuities "when they should respectively attain their ages of twenty-one years or day or days of marriage," and the direction was to lay out

(1) 6 Ves. 239, 249; 5 R. R. 277.

(2) (1817) 2 Mer. 363, 386; 16 R. R. 168.

C. A. 1904 — BOWLBY, *In re.* BOWLBY *v.* BOWLBY. — Vaughan Williams L.J.

for the benefit of the grandchildren respectively the interest, the whole of which was given till they should respectively attain twenty-one or marry. The legacy was accompanied by an absolute gift of the interest. Whereas in *Leake* v. *Robinson* (1) there was only a direction for maintenance out of the interest, and no gift of the interest. These cases in which there is an express direction for interest, and in which the interest will or will not follow the fate of the principal according as the interest is, or is not, given to the child legatee, do not seem to me to govern cases in which the interest is given in accordance with the rule of construction laid down by Lord Hardwicke in *Green* v. *Belchier*. (2)

Mr. Simpson in his book on the Law of Infants, 2nd ed. pp. 317 and 318, states generally, that "where the infant is entitled to the whole income of a fund given for his maintenance, whether absolutely or till the happening of a certain event, such part of the income as is not applied to his maintenance belongs to him absolutely or to his personal representative, as the case may be," and he cites *Webb* v. *Kelly* (3) as an authority for this proposition. That case, like *Hanson* v. *Graham* (4), was one in which there was an express direction as to maintenance, and the Court held, as they did in *Hanson* v. *Graham* (4), that the gift was so worded as to constitute a gift of the income. Mr. Simpson says (p. 318): "On the other hand, where the legatee is entitled not to the whole income, but to maintenance out of it, the surplus, after providing a proper maintenance, follows the fate of the principal whatever that may be, and does not pass to the personal representative of the legatee"; and he cites *Hanson* v. *Graham* (4) and a number of other cases.

But neither the proposition in the text, nor any of the cases cited, conclude the question as to what is the true construction of the father's will in cases in which the father makes a gift in futuro, or a contingent gift to a child for whose maintenance no provision is made outside the gift, nor the consequential

(1) 2 Mer. 363; 16 R. R. 168.
(2) 1 Atk. 505.
(3) (1839) 9 Sim. 469; 47 R. R. 288.
(4) 6 Ves. 239; 5 R. R. 277.

question who will be entitled to the accumulations of interest not required for maintenance, and I can find no case anywhere which concludes these questions.

It appears, however, that there is a strong opinion amongst equity lawyers that the accumulations in such a case follow the fate of the principal; but it has never been so decided, and this view certainly seems difficult to reconcile logically with the statements of those judges who laid down the canon of construction.

So far as the practice is concerned, it seems that the interest as it accrues is never carried to the account of the infant, and that there is no case, or, at all events, no reported case, in which the personal representatives of a child dying under twenty-one, or before the happening of the contingency upon which the legacy was payable, have obtained payment of the surplus interest accruing during the child's life beyond what was required for maintenance.

This, of course, goes strongly to negative the child's right to those accumulations; but no case was cited to us in which the accumulations of interest were ordered to be paid to a residuary legatee, or the next of kin, or the remaindermen. I am only speaking, of course, of cases in which the interest became payable only by virtue of the rule of construction to which I am referring, applied in cases of a legacy in futuro, or a contingent legacy given by a parent to a child for whose maintenance there is no provision. I am not speaking of cases in which interest is expressly given, and constitutes a part of the gift in futuro, or the contingent gift.

On the other hand, I find in *Wynch* v. *Wynch* (1) that Kenyon M.R. seems to have been of opinion that, if the father had not directed maintenance to be paid out of his personal estate, his children would have been entitled to interest on their legacies eo nomine. Again, in *Chambers* v. *Goldwin* (2) there was an express direction for maintenance of a daughter till twenty-one or marriage, and a contingent legacy, in case she should attain twenty-one, payable at and to carry interest from that time. The daughter married at eighteen, and her

(1) 1 Cox, 433, 434. (2) 11 Ves. 1; 8 R. R. 61.

C. A.
1904
BOWLBY, *In re.*
BOWLBY *v.* BOWLBY.
Vaughan Williams L.J.

husband claimed, and the Court allowed, maintenance between the marriage and the majority of the daughter at the rate of 350*l.* a year. I do not know if the Court expressly fixed the rate of interest, or whether the 350*l.* was the whole of it; but as the application was not made by the husband until after the maintenance had been given by him, I suppose the case was dealt with as if the allowance had been made pending infancy. It is difficult, however, to justify the order, except upon the ground that the Court thought fit to treat the will as authorizing interest to be allowed on the legacy from the end of the period during which the testator had expressly directed maintenance to be provided for the child until the child attained the age of twenty-one. It is difficult to suppose that the Court intended to prolong the period during which maintenance should be allowed as such beyond the period defined by the testator.

Martin v. *Martin* (1) runs on the same lines, the maintenance given by the will being out of the testator's residuary estate until the son should attain the age of fifteen. There was a legacy to the son of 6000*l.* contingently on his attaining the age of twenty-one, and he also took a share of the residuary estate, and Wood V.-C. (2) said: "I think, on the whole, the proper construction is, that maintenance should be allowed by payment of interest on the legacy"; and then, after saying that "it must be implied that, although the legacy itself is contingent, interest is to be given in the meantime," Wood V.-C. concluded: "Lord Eldon having thus decided"—that is, in *Chambers* v. *Goldwin* (3)—"I am bound to give the plaintiff interest on one or other of his legacies, and he being entitled to both contingently, I must select that which will be most for the benefit of the infant; and declare that interest at 4*l.* per cent. is payable upon the 6000*l.* legacy."

I confess that I have considerable difficulty in coming to the conclusion that this interest, allowed by the Courts as a matter of construction on a legacy given to a child by its parent for the purpose of maintenance, ought to follow the fate of the principal.

(1) L. R. 1 Eq. 369. (2) L. R. 1 Eq. 371. (3) 11 Ves. 1; 8 R. R. 61.

If the interest itself is contingent on the legatee attaining the specified age, of course the interest will follow the fate of the principal; but it is impossible to suggest that interest, which is to provide maintenance for the child, can possibly be contingent in this sense. The interest must be something which immediately and absolutely, to the extent required, can be applied to the use and benefit of the child.

Now let me assume that such interest can only be called for to the extent required, and that the child dies an infant. Why should the accumulations of this interest, as to which the testator has given no express direction whatever, be allowed on the legacy for the benefit of the remainderman, or other person taking by a gift over, who may be a middle-aged man or woman? But if the accumulations of interest are to go to the remainderman this is the result. I could understand a construction of the testator's will under which the Court simply held that the goodwill of the testator, evinced by his gift to a child of a legacy payable in futuro or contingently, necessarily imported an intention by him to provide for the maintenance of that child out of the residue of his estate, so as to give the child a chance of living till the contingency might occur. In such a case there would be no surplus. But unfortunately this is not the construction which the Courts have adopted. For again and again one finds expressions like that used by the Master of the Rolls in *Harvey* v. *Harvey* (1): "Yet the infant legatee ought to have interest allowed him during his infancy in order for his maintenance."

The intention of the testator is to give interest on the legacy, and to give it to the child himself. It seems to me that to give the accumulations to the remaindermen is altogether outside the intention imputed to the testator.

I wish now to say a few words as to the effect of a direction in the will to segregate a contingent legacy from the rest of the estate.

Now *In re Cotton* (2), which was decided under Lord Cranworth's Act, shews that under that Act, when a legacy is of capital plus income, maintenance might be ordered out of the

(1) 2 P. Wms. 22.

(2) (1875) 1 Ch. D. 232.

C. A. 1904 BOWLBY, *In re.* BOWLBY *v.* BOWLBY. Vaughan Williams L.J.

income to which a child is contingently entitled as an accretion to the capital. And *In re George* (1) shews that when there is a gift of the corpus, but not of the income, Lord Cranworth's Act does not apply.

It seems to follow that, if the case is one in which the income is applicable for maintenance, it can only come within s. 43 if the construction of the will is such that the intermediate income, as distinguished from maintenance out of it, belongs to the child.

The direction to segregate a fund to provide for the gift is the equivalent of a contingent legacy of the fund plus its income.

If you have a contingent gift of the fund plus its income, maintenance may be given, not because the infant is entitled to the income immediately on the testator's death, but because he is entitled to it on the happening of the contingency.

But in the present case the daughter is not entitled to the intermediate income on attaining the age of twenty-one; she is only entitled to the income of the capital fund increased by the accretion of the accumulations.

If s. 43 does not apply, the result is that she is only entitled to that which she gets by the true construction of a will in which a father gives a gift in futuro or a contingent gift to a child, without providing for its maintenance in the period intervening before the attainment of the age or the occurrence of the contingency.

If that to which she is so entitled is the interest, she is entitled to that, not contingently, but immediately on her father's death. But, if that is a true description of what she is entitled to, then in respect of that interest she is brought within the scope of s. 43, because that property is property held by trustees in trust for the infant for life, subject to a defeasance, as the words import, on her death or by necessary merger on her acquiring the fund.

The only effect of a direction for segregation and investment, outside s. 43 of the Conveyancing Act, is to convert the contingent gift of the capital sum into a contingent gift of the

(1) 5 Ch. D. 837.

capital sum plus the income, so that on the happening of the contingency the capital sum will be thus enhanced. Such a case is merely *Hanson* v. *Graham*. (1) The enhanced capital will all go to the legatee on the happening of the contingency, and if there is a mere direction for maintenance this will, of course, leave the income to follow the fate of the capital, except so far as it is applied for maintenance.

I agree that a direction for segregation will have this effect in the present case so far as the legacy is concerned. It makes the legacy, upon a true construction, a contingent gift of the capital plus the income, but then it is not followed by a direction for maintenance. The fact is that, having regard to the legacy being a contingent one to a child for whose maintenance no provision is made in the interval between the death of the father and the happening of the contingency, the legacy must be read as though it contained these additional words: "And I direct that my daughter shall be allowed interest on the legacy during her infancy." The result is that the case is exactly on all-fours with what Sir W. Grant M.R. held to be the true construction of the express words in *Hanson* v. *Graham* (1), i.e., that, inasmuch as the direction for maintenance in that case was coupled with an express gift of the whole of the income to the children, the income, though given for maintenance, did not follow the fate of the principal. Sir W. Grant expressly declared that the form of the legacy was such as, apart from the direction for maintenance, would have constituted a contingent gift of the capital plus the income, i.e., this was a gift which could have equally been effected by a gift of the capital plus a direction for segregation; but, notwithstanding this, he held that, as the direction for maintenance, properly construed, constituted a gift to the children of the interest, the interest did not follow the fate of the principal. So here I say that, if the construction put by Lord Hardwicke, Lord Eldon, and others on the will of a parent amounts to a gift of the interest to the children, that interest will not follow the fate of the principal. If my view of this construction put by Lord Hardwicke is right, a direction to segregate does not affect

(1) 6 Ves. 239; 5 R. R. 277.

C. A. 1904 — BOWLBY, *In re.* BOWLBY *v.* BOWLBY. — Vaughan Williams L.J.

the general law on this point, and then, so far as s. 43 is concerned, if the case does fall within the section, either the view of Buckley J. in *In re Scott* (1) is right or, if it is not, the gift of the interest to the child is a contrary intention within sub-s. 3 of that section.

The whole question really is, What was the construction put by Lord Hardwicke, and other judges following him, on the will of a father in such a case? So far as their words are concerned, I think that they construed the will of the father as giving the interest to the child independently of the happening of the contingency.

But I am told that the practice of the Court has been to take a different view of what these judges meant, notwithstanding the fact that down to the present day the language of every judgment which I have seen speaks of the legacy to the child "bearing" or "carrying" interest. I feel, therefore, that, sitting as I do here, I am bound to follow the practice of the Court.

ROMER L.J. Before dealing with s. 43 of the Conveyancing Act, 1881, I desire to make some remarks on the law (apart from that section) concerning a legacy given by a testator to his infant child, made contingent on the child attaining twenty-one years of age. It is, of course, well settled that if, and for such period as, no maintenance is expressly provided for the infant by the testator, the legacy will bear interest for the maintenance. But the fact that the legacy is to bear interest for such a purpose, though it may be and often is shortly referred to by saying that the legacy bears interest, does not make the legacy the less a contingent one, or put the infant into the position of having an immediate vested life interest in the income of the legacy. All that the infant is entitled to have is maintenance. And the authorities shew that the Court is not bound to order that the legacy shall bear a greater rate of interest than is necessary for that maintenance. In Roper on Legacies, 4th ed. vol. ii. p. 1257, it is stated: "The Court determines the quantum of the allowance, either the whole of

(1) [1902] 1 Ch. 918.

the usual interest allowed by the Court, or less, according to circumstances"; and at p. 1290: "Maintenance being in fact another name for the whole, or a proportion, of the interest on the legacy." And in *Chambers* v. *Goldwin* (1) the Court in fact made such a legacy, during a period when the infant daughter was under the rule entitled to interest for maintenance, bear interest at a rate less than 4 per cent. per annum, and it does not appear that during that period any further interest was allowed by the Court in favour of the legatee, though she attained twenty-one and became absolutely entitled to the legacy. And it is possible that other like cases may be found. But the Court has undoubtedly jurisdiction to provide for the legacy carrying the full 4 per cent. interest, even though at the commencement of the infancy the child may not require the whole; and I think this is the course often adopted of late years, probably because the child, as it becomes older, may require for its maintenance the full interest, and even to have recourse to the surplus of past years. But, notwithstanding this practice, and whatever may be the reason for it, I see no sufficient ground for holding that the Court has lost its right not to order payment of the full 4 per cent. interest in a case in which there is no need for the full interest for the purposes of the maintenance. In cases in which the full 4 per cent. is called for, the Court may order it, or parts of it, from time to time to be applied in or towards the maintenance of the child. But, except so far as the orders of Court are concerned, or the interest may have been applied or may be required for maintenance, the child has acquired no vested interest therein. And, should there be a surplus during the infancy not covered by any order of Court, and not required for maintenance, that surplus does not, in my opinion, become the property of the child, but is regarded as an accretion to the corpus of the contingent legacy, and the child cannot obtain it, unless he attains twenty-one years of age and so becomes absolutely entitled to the legacy. And, accordingly, so far as I can find, there is no case reported, and certainly no case is known to me, in which the legal personal representatives of

(1) 11 Ves. 1; 8 R. R. 61.

C. A. 1904 BOWLBY, *In re.* BOWLBY *v.* BOWLBY. Romer L.J.

a child dying during infancy have obtained payment of the surplus accruing during the child's life. Nor is it the practice of the Court to carry over the surplus to the separate account of the child. The practice is to treat the surplus as appertaining to the corpus of the legacy, so that the child on attaining twenty-one may apply for the legacy and accumulated surplus together. The views above expressed are clearly set forth in the judgment of Sir William Grant M.R. in *Hanson* v. *Graham* (1), where he was pointing out the difference between a direct gift of interest on a contingent legacy, and the right to maintenance, and, referring to the argument before him that what he ultimately held to be a true gift of the interest was more like a gift for maintenance, he said: "On the other side it was contended, that the interest is not so given as to bring it within the general rule, but what is given is more like maintenance. It is true, it has been held, that has not the same effect as giving interest; upon this principle; that nothing more than a maintenance can be called for; what can be shewn to be necessary for maintenance: however large the interest may be; and therefore what is not taken out of the fund for maintenance must follow the fate of the principal; whatever that may be." This principle has, so far as I am aware, always been acted on by the Court in cases like those which I have been considering. And, in the case of the child dying under twenty-one, the surplus ought to go to those whose funds have provided it, seeing that the interest was only payable for maintenance.

I will now consider the case in which a testator, for the purpose of providing a fund for a contingent legacy, sets apart and creates a trust of certain personal property. In that case, apart from any special provisions to the contrary by the testator, and apart from any question as to maintenance, the income would be added to the corpus, and the legatee could only claim it if and when he became entitled to the corpus. See, for example, the cases referred to in the judgment of Chitty J. in *In re Clements*. (2) If, then, in the case in which a fund is so set apart, the legatee becomes entitled

(1) 6 Ves. 249. (2) [1894] 1 Ch. 665.

to maintenance, it follows that, subject only to the right to maintenance thereout of the child, the income ought to be and will be accumulated and added to the corpus. And, if the child dies during infancy, the surplus of the income, up to the time of the death, remaining after complying with any order of Court, and after providing for any sum still required for past maintenance, will not belong to the child's legal personal representatives, but will pass to those entitled to the corpus of the fund. For the setting apart of the fund, and the right of the child to maintenance out of the income, did not change the contingent nature of the child's legacy. The child did not acquire a vested life interest during minority in the income. Accordingly, after providing for maintenance, the Court does not order the surplus income during infancy to be carried to the separate account of the infant. Nor has it, so far as I am aware, ever ordered any surplus accruing during infancy to be paid to the child's legal personal representatives on the child dying while still a minor.

I now come to the circumstances of the present case. The testator has authorized his trustees to set apart out of his personal estate a sufficient fund to answer (inter alia) the legacies given by him to each of his daughters on her attaining twenty-one years of age, or marrying with the consent (if marrying after his death) of her guardians. But those legacies are settled by the will upon trust in each case for the daughter for life, and after her death upon trust for other persons whom I will call the remaindermen. The authority to the trustees to set apart has been acted upon by them in the case (inter alia) of the daughter Eva. Now, apart from any question as to the right of that daughter to maintenance, and apart from the question of the true construction of s. 43 of the Conveyancing Act, 1881, the setting apart did not alter the contingent nature of the legacy. It did not make the life interest of the daughter begin before she attained twenty-one or married. The daughter, apart from her right to maintenance, acquired no vested interest in the income. And, so far as the income is not applied for her maintenance, it must, in my opinion, be held upon trust to accumulate it as part of the contingent

C. A. 1904 BOWLBY, *In re.* BOWLBY *v.* BOWLBY. Romer L.J.

legacy. And this, whether the daughter, though only tenant for life of the fund and notwithstanding the special provisions of the testator's will, is entitled to maintenance because she was the child of the testator (a point I need not decide), or because of the provisions for maintenance made by s. 43. This being so, unless there be something to the contrary in s. 43, on the daughter attaining twenty-one, so far as the income of the fund set apart was not required or applied for her maintenance, it became part of the corpus of the legacy, and the daughter only became entitled to the life interest of the fund regarded as a whole.

This brings me to a consideration of the special provisions of s. 43. Now on the construction of that section I cannot say that I feel any doubt. It appears to me that under sub-s. 2 the surplus income, after providing for maintenance, is to be accumulated for the benefit of the persons who become entitled to the "property" from which the income has arisen—that is to say, in this case, the persons who became entitled to the corpus of the fund set apart—and those persons are, not the daughter alone, but the daughter for life, and the remainder-man after her death. So that the daughter becomes entitled only to the income of the ultimate fund arising from the original corpus of the fund and the surplus accumulated income combined.

In my opinion *In re Scott* (1) was wrongly decided. I think that the ground on which Buckley J. based his judgment in that case, namely, that the tenant for life of the contingent legacy was entitled to the income during minority apart from the Act of 1881, was wrong, and led him to an erroneous way of construing s. 43.

COZENS-HARDY L.J. This is an appeal from an order of Joyce J., who has declared that the unapplied income and accumulations of a settled legacy of 50,000*l.* belong to the daughter Eva Mary Salvin Bowlby, who has attained twenty-one. This order was made by the learned judge, contrary to his own view, on the ground that the case was covered by the

(1) [1902] 1 Ch. 918.

decision of Buckley J. in *In re Scott* (1), and this appeal is in truth brought to review that decision. Buckley J. held that, according to the true construction of s. 43, sub-s. 2, of the Conveyancing Act, 1881, which directs trustees to accumulate the residue of income not applied for maintenance, and to hold the accumulations for the benefit of the person who ultimately becomes entitled to the property from which the same arises, a tenant for life of a contingent share of residue, who had attained twenty-one, was entitled to the accumulations. I am unable to accept this view. Subject to any "contrary intention" expressed in the instrument (sub-s. 3), it seems to me that the words "property from which the same arises" mean the property the income arising from which has been accumulated. This involves, not that the persons interested in the capital will alone take, but that the accumulations become an accretion to the capital, with the result that all persons interested therein, whether as tenant for life or otherwise, will in due course and order take precisely the same interests as they take in the original capital. I cannot adopt the view that the accumulations of income arising before the contingency happens belong to the person whose life interest does not commence until the contingency happens. I think, therefore, that the decision in *In re Scott* (1) ought not to be followed. It was assumed in *In re Scott* (1) that s. 43 authorized the trustees to allow maintenance and to accumulate the residue of the income; but I think this was not so. It is settled that s. 43 has no application unless, apart from the Act, the infant would under the terms of the will be entitled to the arrears of income on attaining twenty-one: *In re Dickson.* (2) This must mean either as tenant for life or absolutely. If a share of residue is given absolutely to an infant contingently on his attaining twenty-one, the infant will be entitled to both capital and arrears of income on attaining twenty-one, and s. 43 will apply. But if the infant only becomes tenant for life of the share of residue with its accretions on attaining twenty-one, the case does not fall within the language of s. 43, as interpreted by the Court of Appeal.

(1) [1902] 1 Ch. 918. (2) 29 Ch. D. 331.

C. A. 1904 BOWLBY, *In re.* BOWLBY *v.* BOWLBY. Cozens-Hardy L.J.

The main stress of the argument before us was, however, based upon a ground which was not suggested in *In re Scott.* (1) Put shortly, it may be stated as follows: A contingent legacy given by a father to an infant child is an exception to the rule that interest is not payable until the contingency happens, and in such a case interest is payable from the testator's death until the happening of the contingency, and the child is entitled to have maintenance provided out of the interest, and the child has a vested interest in the whole of the income, or so much of the income as may not be applied for maintenance; and, inasmuch as the object of s. 43 was not to alter the rights of parties, the accumulations arising from the vested interest of the infant legatee must belong to the infant, there being an expression of a "contrary intention" within sub-s. 3 of s. 43 sufficient to negative the directions in sub-s. 2: *In re Humphreys.* (2) It is not easy to understand precisely on what principle the Courts have for centuries proceeded in this matter. The words used by a testator have a different operation and effect according as the legatee is or is not an infant child of the testator. It appears to be a matter of construction, a presumption being raised that a father making a future vested or contingent provision for an infant child did not intend the infant to be deprived of maintenance in the meantime. It is, however, certainly not an absolute rule, that in all cases a legacy by a father to an infant child carries interest from the testator's death, for the presumption does not arise if a provision for maintenance out of other property is contained in the same will: *Wynch* v. *Wynch* (3); *Ellis* v. *Ellis* (4); *Donovan* v. *Needham.* (5) There are, moreover, authorities which shew that interest allowed on such a legacy is not always allowed at the ordinary rate. On the other hand, there is no doubt that, whether we regard the language used by text-writers, or the form of order usually adopted by the Court, the common means of providing maintenance has been to declare that the legacy carries interest from the death.

(1) [1902] 1 Ch. 918.
(2) [1893] 3 Ch. 1.
(3) 1 Cox, 433.
(4) 1 Sch. & Lef. 1.
(5) 9 Beav. 164.

Upon the whole, however, I think that the true view is, that the infant is entitled, not to interest on the legacy, as such, but only to maintenance, although for the purpose of creating a fund, and as a matter of convenience, the Court has been in the habit of allowing an annual sum at the rate of 4 per cent. upon the amount of the legacy: *Mole* v. *Mole*. (1) The case of *Chambers* v. *Goldwin* (2), in which a provision for maintenance in the will ceased on the daughter's marriage at the age of eighteen, and she did not attain a vested interest in her legacy of 15,000*l*. until twenty-one, is important. It was expressly stated that the legacy was to carry interest at the rate of 6 per cent. from her attaining twenty-one. Lord Eldon there allowed maintenance for the interval between marriage and the attainment of twenty-one, but not in the shape of interest on the legacy, nor at the same rate at which it had been allowed up to marriage. On examining the record it appears that the husband applied for and was allowed arrears of maintenance at the rate of 350*l*. a year, and there is no trace of any further payment having been made.

Martin v. *Martin* (3) is also important. There was a similar contingent legacy to the plaintiff, and a provision for maintenance up to the age of fifteen. Wood V.-C. allowed maintenance, not by giving interest on the legacy from the testator's death, but simply from the date when the provision in the will for maintenance ceased. Upon the whole, I think it is not correct to say that an infant child is entitled, as of right, to interest as such from the father's death until the contingency happens; and, that being so, the contention on the part of the respondent fails.

No authority has been produced in which this doctrine has ever been applied to a case in which the infant child is only tenant for life of the contingent legacy, and, if I had taken a different view on the main point, I am not prepared to say that I should have extended the doctrine to such a case.

I have thought it desirable to deal with the general principles raised before considering the particular language of this will,

(1) 1 Dick. 310.
(2) 11 Ves. 1; 8 R. R. 61.
(3) L. R. 1 Eq. 369.

C. A. 1904 BOWLBY, *In re.* BOWLBY *v.* BOWLBY. Cozens-Hardy L.J.

upon which, as it seems to me, the case might well be decided. The testator's eldest son had attained twenty-one, and was named executor and was made residuary legatee. A legacy of 50,000*l.* is given by the testator to each of his younger sons who should attain twenty-five, and there is an express maintenance clause, which provides that the accumulations should go in augmentation of and so as to follow the destination of the legacy. Then follows a legacy of 50,000*l.* to each daughter who should attain twenty-one or marry with consent, with a declaration that the legacy should not vest absolutely in her, but should be retained by the trustees of the will, and held by them upon trust to pay the income of the legacy to the daughter for life, with various trusts over. The will subsequently authorized the trustees at their discretion to appropriate any part of the testator's personal estate in or towards satisfaction of any legacy given by the will; and in the last clause but one of the will the testator directed that all his children should be made wards of Court, "and that, notwithstanding anything hereinbefore contained, all powers, whether statutory or otherwise, as to the education, maintenance, or advancement of such children, or any of them, while minors, shall be exercised by my trustees only under the direction of the said Court."

Now it seems to me clear that s. 43, sub-s. 2, had no application unless and until an appropriation was made, for until that date it was impossible to say that any property was held by the trustees in trust for the infant. But an appropriation has been made by the trustees, with the concurrence of the residuary legatee, who was in fact a party to the appropriation. This appropriation was in satisfaction of the contingent legacy. The testator has by this final clause manifested an intention that, with reference to this appropriated fund, s. 43 shall apply in like manner as the express power of maintenance is to apply to the legacies to younger sons. In other words, he has said that s. 43 shall be treated as applicable to the funds appropriated for the daughter's contingent legacies, even though, apart from that clause, s. 43 would not be strictly applicable to the case.

What, then, is the provision that he has made? That the

Court shall say what allowance is to be made by the trustees for maintenance. This and only this is to be given. This is what has been done in fact. In the language of Sir W. Grant in *Hanson* v. *Graham* (1), whatever is not taken out of the fund for maintenance must follow the fate of the principal, whatever that may be. The daughter's life interest in the contingent legacy only arose on the happening of the contingency, i.e., on her attaining twenty-one. Prior to that date she took no interest in the legacy as such, although she was entitled to a provision for maintenance out of the antecedent income arising from the appropriated fund. I do not think it can reasonably be held that she had a vested interest in the income of the appropriated fund for the period before the contingency itself happened.

The result is that, in my opinion, the appeal must be allowed, and a declaration made according to the notice of appeal.

Solicitors: *Farrer & Co.; Kennedy, Ponsonby & Ryde.*

(1) 6 Ves. 239, 249; 5 R. R. 277.

W. L. C.

C. A. 1904 Aug. 10.

CORPORATION OF OLDHAM *v.* BANK OF ENGLAND.

[1904 O. 1046.]

Local Government—Education—School Board—Borough Council—Appointed Day—Transfer of Property—Vesting—Consols—National Debt Act, 1870 (33 & 34 *Vict. c.* 71), *s.* 22—*Elementary Education Act*, 1870 (33 & 34 *Vict. c.* 75), *s.* 30—*National Debt* (*Stockholders' Relief*) *Act*, 1892 (55 & 56 *Vict. c.* 39), *s.* 4—*Education Act*, 1902 (2 *Edw.* 7, *c.* 42), *ss.* 5, 25; *Sched.* 2, *clause* 1.

This was an action brought by the corporation of Oldham against the Bank of England to obtain possession of 780*l.* 0*s.* 2*d.* 2½ per cent. Annuities. The plaintiffs by their council were, under the Education Act, 1902, the local education authority for the district of the borough of Oldham. The Act came into operation in that district on January 1, 1904, which was the "appointed day," and at that time these Annuities stood in the books of the Bank of England in the name of the Oldham School Board. The plaintiffs claimed that on the appointed day the school board had ceased to exist, that the 780*l.* 0*s.* 2*d.* had then become vested in them by virtue of the Act, and that no further transfer was necessary. The bank contended that the Annuities could only be transferred by an entry in their books, that the Oldham School Board had not been dissolved, that the Annuities must be transferred by them to the plaintiffs, and that the Annuities had not been vested in the plaintiffs by virtue of the Act:—

Held (reversing the decision of Farwell J.), that by s. 5 of the Act of 1902 the school board had for all purposes ceased to exist on the appointed day; that by sched. 2, clause 1, to the Act the Annuities had on that day vested in the plaintiffs by virtue of the Act; and that no further transfer was necessary.

APPEAL from Farwell J.

This was an action brought by the corporation of Oldham against the Bank of England to obtain possession of Annuities which were standing in the books of the bank in the name of the Oldham School Board. The mayor, aldermen, and burgesses of the borough of Oldham, acting by their council as the council for the county borough of Oldham, were, under the Education Act, 1902, the local education authority for the district of the borough. The Act came into operation in this district on January 1, 1904, which was the day appointed by the Board of Education. On that day there stood in the

books of the Bank of England in the name of the Oldham School Board the sum of 780*l.* 0*s.* 2*d.* 2½ per cent. Annuities, representing moneys set aside by the school board to meet liabilities in respect of loans raised for the erection of elementary schools within their district. The plaintiffs alleged that on the "appointed day," i.e., January, 1, 1904, the school board was dissolved by virtue of the provisions of the Act, and that they had succeeded to, and had since exercised and were now exercising, the powers formerly vested in the school board.

The plaintiffs claimed—(1.) a declaration that they were entitled under the provisions of the Act to the 780*l.* 0*s.* 2*d.*, and to the dividends due or to accrue due in respect thereof, and to all the rights of registered stockholders in respect of the annuities; and (2.) an order on the defendants to pay to them the dividends now due or to accrue due in respect of the annuities, and to register the plaintiffs in the books of the bank as entitled to the annuities.

The defendants contended that the Annuities in question had not been vested in the plaintiffs by the Act of Parliament. They took up the position that these Annuities formed part of the National Debt, of which they had the management under the National Debt Act, 1870. Under that Act books were kept wherein all transfers in England of Annuities were entered. The person or corporation in whose name stock was standing in the books or their attorneys were by the Act alone entitled to transfer the stock, and any transfer must, under the Act, be signed by the stockholder or his attorney in the books so kept by the bank. In practice, books called transfer books were kept at the bank in which a stockholder proposing to transfer executed a transfer by which, in the presence of a witness, he assigned and transferred the stock to the intended transferee. It was by the Act expressly enacted that, except as otherwise provided by Act of Parliament, no other mode of transferring stock should be good in law. The Oldham School Board were a a body corporate by the Elementary Education Act, 1870, s. 30, sub-s. 1, and the Annuities were transferable by them by entry in the books signed by the attorney of the board, and in no other manner. The bank also alleged that by the National

C. A. 1904

OLDHAM CORPORATION v. BANK OF ENGLAND.

Debt Act, 1870, they might before paying any dividend require evidence of the title of the claimant; that they had required such evidence, but that none had been tendered to them of the title of the plaintiffs to the Annuities, or of their right to receive the dividends on them.

Farwell J. held that the school board had not been dissolved for all purposes; that the Annuities were not vested in the plaintiffs by the statute, but were still vested in the school board, so that a transfer was necessary; but that the equitable title to the Annuities was vested in the plaintiffs, and that they could themselves execute a transfer under s. 4 of the National Debt (Stockholders' Relief) Act, 1892.

The plaintiffs appealed.

Sir R. B. Finlay, *A.-G.*, and *R. J. Parker*, for the appellants. The general scheme of the Education Act, 1902 (1), is that school boards should come to an end, and that education authorities should be created in their place, in whom all the property of the school boards should be, by the Act, thereupon vested. That intention was carried out by sched. 2, clause 1, which says that all the property of the board, existing at the appointed day, "shall be transferred" to the council. That means that on the appointed day the property of the board vests in the council without any act done by the board. No further transfer is necessary. The word "shall" is used because the transfer is not to take place till the "appointed day." The "appointed day" in the present case was fixed by the Board of Education under s. 27, sub-s. 2, for January 1, 1904. On that day the

(1) Sect. 5 of the Education Act, 1902: "The local education authority shall, throughout their area, have the powers and duties of a school board and school attendance committee under the Elementary Education Acts, 1870 to 1900, and any other Acts, including local Acts, and shall also be responsible for and have the control of all secular instruction in public elementary schools not provided by them; and school boards and school attendance committees shall be abolished."

Sched. 2, clause 1: "The property, powers, rights and liabilities (including any property, powers, rights and liabilities vested, conferred or arising under any local Act or any trust deed) of any school board or school attendance committee existing at the appointed day shall be transferred to the council exercising the powers of the school board."

school board ceased to exist under s. 5. The words "shall be abolished" in that section mean that the school board is dissolved and ceases to exist. The effect of that dissolution is that on and after the appointed day there is no body or person who can make a transfer. Before that day there is no new education authority. Transferor and transferee are not in existence at the same time; therefore there can be no transfer except by the Act itself. That "abolished" means ceasing to exist is shewn by sched. 2, clause 16, where the word is used of an office. Clause 10 provides that there shall be no further elections to school boards after the passing of the Act, and that the term of office of the members at that date shall continue to the appointed day, which shews that there is to be no board after that day.

That "shall be transferred" in clause 1 of sched. 2 means that the property is by virtue of the Act to vest in the new authority on the appointed day is proved by the other provisions of the Act: ss. 6, 7, 18 sub-s. 1 (*d*), 20 (*b*). The word "transfer" is applied in sched. 2, clause 1, to "property, powers, rights and liabilities," which are defined by s. 24, sub-s. 3. "Transfer" must have the same meaning throughout the clause, and it is obvious that liabilities cannot be transferred by deed. Therefore it must mean that all these things are to "vest." The "liabilities transferred" to the council are mentioned in s. 18, sub-s. 1 (*d*), and "the transter of property and officers" in s. 25, sub-s. 1. "Officers" can only be transferred by the Act itself. "Transfer" is the word used in sched. 2, clauses 2, 3, 6, 7, 8, 16. That it means "vest" is shewn by clauses 4 and 5. Sects. 85 to 88 of the Local Government Act, 1894, are by clause 8 incorporated in this schedule, and s. 88 speaks of the time when any powers, property, &c., "are by this Act transferred." That is a recognition of transfer by virtue of the Act itself, and illustrates the absolute continuity of the two bodies. Clause 16 speaks of the officers of any authority whose property, rights, and liabilities "are transferred under this Act," and clause 17 refers to every officer "so transferred."

We submit that Farwell J. was wrong in holding that the

C. A. 1904 OLDHAM CORPORATION v. BANK OF ENGLAND.

school board had any existence after the appointed day, and that a further transfer was necessary. It may be that in the case of Consols the new education authority could themselves execute a transfer under the National Debt (Stockholders' Relief) Act of 1892; but that does not apply to other kinds of property, and the necessity for further transfers will cause endless difficulties. There is nothing in the position of the Bank of England which is inconsistent with our contention: *Hyde Corporation* v. *Bank of England* (1); *Morton* v. *Bank of England*. (2)

[They also referred to the Bankruptcy Act, 1883, s. 50, sub-s. 3.]

Latham, K.C., *Upjohn, K.C.*, and *Howard Wright*, for the Bank of England. For 200 years the bank has kept transfer books, and it is bound by the National Debt Act, 1870, ss. 22 to 25, to allow transfers of stock by entries in those books alone. There has only been one instance of a transfer of stock by Act of Parliament. We do not contend that stock cannot be vested by statute, but that Parliament will not interfere with so old a practice without express words. In the cases which have been referred to, the words relied upon were different from those in this Act. Even if the council have got a complete equitable title, a conveyance of the legal estate is necessary. They might have to get a vesting order under the Trustee Act if the property were not Annuities. In the case of Annuities there is no difficulty, for the Act of 1892 provides what is to be done. No doubt the Act of 1902 must be construed so as to apply to all kinds of property; but it contemplates the necessity of further transfers; it does not rely on automatic vesting. In s. 5 "abolished" only means abolished for the purposes of the section. It is not the same as dissolved. A school board is a body corporate: Elementary Education Act, 1870, s. 30. The Act does not say that the continuing members shall vacate their office on the appointed day. Clause 22 of sched. 2 to the Act of 1902 speaks of adjustment. The circular sent out by the Board of Education on March 23, 1903, to all school boards in regard to cash

(1) (1882) 21 Ch. D. 176. (2) [1904] 1 Ch. 664.

balances which pass to local education authorities on the transfer of powers points out that s. 68 of the Local Government Act, 1894, as applied by clause 22, makes "adequate provision for the adjustment of all such balances, to be effected by agreement between the school boards and the new authorities. It follows that school boards need not hesitate to issue their ordinary precepts to the rating authorities, or any further precepts that may be required to enable them to ensure the liquidation in full of all current debts and liabilities before the appointed day": Barlow and Macan on the Education Act, 1902, 2nd ed. p. 218.

[*Sir R. B. Finlay, A.-G.* That only applies before the appointed day.]

School boards are evidently supposed to continue in existence for many purposes, and to be still in a position to transfer property. This is not a simple question. In s. 67 of the Local Government Act, 1894, it was provided that all property "shall pass to and vest in the other authority"; and yet it was found necessary to state in the Local Government (Stock Transfer) Act of 1895, s. 1, what further steps should be taken to complete the transfer.

When the Act of 1902 means that anything shall take effect by "virtue of this Act" it says so: sched. 2, clause 4. In clause 2 it only says "shall be transferred"; so some further act of conveyance is necessary.

No reply was called for.

VAUGHAN WILLIAMS L.J. The question that we have to decide in this case is whether the terms of the 2nd schedule of the Education Act of 1902 are such that the property, powers, rights, and liabilities of any school board or school attendance committee existing at the appointed day are transferred by virtue of or under the Act of Parliament to the council exercising the powers of the school board, or whether some additional instrument is necessary before such transfer can be effected. The suggestion is that (whatever may be the case with regard to other property, at all events in respect of stock which the Bank of England has to deal with, and with

C. A. 1904 OLDHAM CORPORATION v. BANK OF ENGLAND. Vaughan Williams L.J.

respect to a transfer of which, generally speaking, there is and has been for a very long time an entry of the transfer in the transfer books of the Bank of England) there is no vesting of the property independently of the execution of some instrument. Part of the argument that was addressed to us was based upon the words "shall be transferred" in sched. 2, clause 1, of the Act of 1902, and I will say something about that presently; but I will observe in the meantime that really in the argument which has been addressed to us by counsel for the bank they did not ultimately rely upon the fact that the words were "shall be transferred" instead of "shall vest," or similar words. The argument finally addressed to us on behalf of the bank was an argument which would have applied equally whether the words were "shall be transferred" or "shall vest."

I will deal first, and very shortly, with the question of the meaning of the words "shall be transferred." There is no doubt that sometimes one does find in Acts of Parliament somewhat cognate to the present Act the words "shall vest," as distinguished from the words "shall be transferred." If one looks at the Local Government Act, 1894, s. 5, sub-s. 2, Clause C, one finds these words used: "the legal interest in all property vested either in the overseers or in the churchwardens and overseers of a rural parish, ... shall if there is a parish council, vest in that council." It is quite true that the words used in the Education Act, 1902, are, not "shall vest," but "shall be transferred"; but if one considers it, there is a very good reason for using the future words there, and a reason which is quite consistent with holding that the property on the happening of "the appointed day" was to vest independently of any future or additional instrument. It must be remembered that the Act of Parliament when it passed was contemplating the happening of a future event, the occurrence of a future day, that is, "the appointed day," and it seems to me that that was quite a sufficient reason for the draftsman employing the words in the future.

Now let us see generally what the provisions of the Act of 1902 are. The 5th section provides that "the local education

authority shall, throughout their area, have the powers and duties of a school board and school attendance committee under the Elementary Education Acts, 1870 to 1900, and any other Acts, including local Acts, and shall also be responsible for and have the control of all secular instruction in public elementary schools not provided by them; and school boards and public attendance committees shall be abolished." I cannot conceive myself but that the word "abolished" there involves dissolution; it means that the school boards and school attendance committees shall be abolished, and it really is not denied that the effect of that section is that from the happening of "the appointed day" the school board and the committee would be incapable of doing anything. The corporation of the school board would, in fact, by virtue of that s. 5, be dissolved in the sense that it would cease to have a legal existence, could not sue, could not be sued, could not hold property, and could not transfer property. Therefore one finds this state of things: that if we accede to the argument that has been addressed to us on behalf of the Bank of England, that some additional instrument of transfer or conveyance is essential to the passing of the property, notwithstanding the occurrence of "the appointed day," this much is perfectly certain, that that instrument could not be executed by the school board.

Then it is said that with reference to the Bank of England and its relation to certain stocks there is an Act of 1892, the National Debt (Stockholders' Relief) Act, and reference is made to s. 4. It is said that the result of that section is that although a transfer could not be executed by the defunct corporation, the school board, yet a transfer of these stocks might be executed by the new educational body, as being a body in whom the right to the stock is vested by Act of Parliament. I will say something more as to this section presently; but I will at once point out that it is obvious that that Act of Parliament, if it gets over at all the difficulty arising from the cessation of existence of the school board, can only do so in respect of a very limited subject-matter. It is not suggested that it does so as to all property: it is not suggested that it

C. A. 1904 OLDHAM CORPORATION v. BANK OF ENGLAND. Vaughan Williams L.J.

does so even as to all stocks. It was mentioned in argument that there were certain Colonial Government stocks, for instance, which would not be governed by that section. The result of that is, that it is quite plain that there is this difficulty about the transfer of property if the word "abolished" in s. 5 has that which, it seems to me, is its plain and obvious meaning.

Again, the words "shall be transferred" are in clause 1 of sched. 2 applied, not only to property, but to powers, rights, and liabilities. With reference to property, it is quite true that with regard to some sorts of property a deed of transfer is required, and, it may be, in some cases a written transfer; but it is not true of rights and liabilities—at all events, it is not true as to liabilities—that any transfer is, according to the general law, either necessary or proper; indeed, such a transfer would not, according to law, transfer the property at all. So that the outcome of all this is that the argument put forward on behalf of the Bank of England cannot be made good, unless in one clause of one Act of Parliament we give a different meaning to the words "shall be transferred" in the case of some of the subject-matters dealt with by the clause from what we should be bound to give in the case of others. To my mind, it cannot be maintained for one moment that with regard to liabilities, or with regard to certain species of property, any transfer or additional instrument of transfer was necessary for vesting.

Now I think that it is really unnecessary for me to go at greater length through the numerous matters that one finds in the Education Act of 1902 which go to shew, first, that "abolished" is used in the 5th section in its natural sense, and, secondly, that the words "shall be transferred" are used to the intent that the moment that the future day arrives all property of the school board ipso facto, by virtue of and under the Act of Parliament, shall vest in the new educational body without the aid of any additional instrument of any sort or kind.

I said that I would say a word more as to the Act of 1892. I do not know that it is necessary for me to do so, because in the view that I take of this case the question as to the effect

of that Act is no longer of any importance. Its only importance arose because Farwell J. in his judgment relied upon it as shewing that in the case of certain stocks, transfers of which are entered in the Bank of England transfer book, you could get over the difficulty of there being no possibility of a transfer by the defunct school board by saying that it might still be right that the Bank of England should in accordance with their practice insist upon having a transfer; and that, at all events in the case of some stocks, that is to say, the stocks to which the National Debt Act, 1870, applied, a transfer could be executed by the new educational body as being a body in whom, by virtue of an Act of Parliament, the right to stock was vested, and as to whom it was said, by s. 4, sub-s. 1, "he shall by virtue of the same provision be deemed to be entitled to make a valid transfer of the stock and to receive and give a valid receipt for any accrued or accruing dividends." It was said that the Act of 1892 gave an equitable right to the new educational body, and that they might, without any transfer being executed even by them to themselves, give a valid receipt for any accrued or accruing dividends of stock, and might also execute afterwards or before, as they thought fit, a transfer to themselves.

As I have not to decide what the construction of that section is, I do not wish to say more than this—that, as at present advised, I think that these words "vested in any persons" in s. 4 mean legally vested. That is not a decision, but it is my view of the section.

Now, having disposed of those matters, I wish to say a word or two upon the argument that, even assuming that the effect of the Act of 1902 was to immediately vest the property of the school board in the new educational body, yet there is a necessity for an additional deed. It was said in the first instance that it was essential to the long and venerable practice of the Bank of England that there should be some such document. I do not think that that can affect the construction of an Act of Parliament. Then it was suggested that there was something in the nature of a transfer of this stock which really prevented it, from its very nature from being

C. A. 1904 OLDHAM CORPORATION v. BANK OF ENGLAND. Vaughan Williams L.J.

transferred without some instrument of transfer. All I can say in answer to that is that, in so far as that is true (and in a sense it is quite true), it is equally true of a number of other things; it is equally true of every chose in action that, if there was not a transfer by the Act of Parliament, there might be a necessity for some deed or written transfer in order to accomplish the passing of the particular piece of property. I think that disposes of the argument that, notwithstanding that the words "shall be transferred" must be construed as "shall vest" on the appointed day we ought not to hold that this stock so vests in the council that the Bank of England ought to act upon its statutory effect without the production of any written instrument. I think they ought so to act.

It was said by Mr. Upjohn that in consequence of the Local Government Act of 1894, under which undoubtedly property, including property in stocks, did vest without a transfer, an Act was passed in 1895 which recognised the proposition that the Bank of England ought not to act upon a statutory vesting without the production of some instrument of transfer. I do not agree with that. The Act of 1895 does not seem to me to have done anything of the sort. It recognises, and is passed upon the basis, that the effect of the Local Government Act of 1894 was that without more the property vested in the person denoted by the statute. But although that was true, and it did vest, and the Bank of England, until the passing of the Act of 1895, recognised for all purposes the statutory vesting of the property, they, of course, had to assure themselves of the identity of the person: they had to assure themselves that the person who came and claimed to be the statutory appointee or donee of the stocks was in fact the person that he pretended to be. Under the statute of 1895 they obtained that by a certificate of the clerk to the county council. All one can say is that at present no equivalent Act of Parliament has been passed in respect of the Education Act of 1902. If it is desirable from a business point of view that such an Act of Parliament should pass, I do not suppose the Legislature when once satisfied of that by the Bank of England would make any difficulty in passing it. But as things stand, in my view, it is perfectly

plain under the Act of 1902 that these stocks did vest by virtue of the words in the 1st clause of the 2nd schedule, and the Bank of England have an absolute indemnity by the very words of the Act, and are not put in any danger or difficulty at all. I do not suppose the Bank of England were thinking principally of any danger to themselves, but rather that it would be a matter of public convenience that the same formalities should be gone through in respect of all transfers of stock, and that it did not matter whether the transfer was a transfer by the terms of an Act of Parliament or a transfer in any other way inter partes. I dare say they think that it would be very much more convenient that all transfers should pass through the transfer book. If that is so, they will get legislation to that effect, but I offer no opinion about that.

I think that this appeal ought to be allowed.

ROMER L.J. The 1st clause of the 2nd schedule to the Act of 1902, on which the question we have to decide turns, is certainly not happily framed; but on the construction of it, and having regard to the provisions of the Act as a whole, I come to the conclusion that the appeal should be allowed. I cannot take the same view of the construction of that clause as was taken in the Court below.

For brevity I will refer to the old educational authority—that is to say, the school board or school attendance committee which was abolished by the Act on "the appointed day"—as "the old board," and I will refer to the new educational authority as "the council."

Now, one thing to my mind is clear about this Act, and that is that on what is defined as "the appointed day" the old board, under the very words of s. 5 of the Act, was abolished; and I cannot find throughout the Act any indication that when it says the old board is to be abolished it does not mean what it says. I cannot think of any stronger word in the English language—whether it is the word usually used for this purpose or not does not seem to me to matter—and I cannot find any word in the English language which more thoroughly expresses the non-continuance for any purpose of the old board, than the

C. A. 1904 OLDHAM CORPORATION v. BANK OF ENGLAND. Romer L.J.

phrase used by the Act of Parliament, that on "the appointed day" it "shall be abolished." As I have said, there is nothing in the Act from beginning to end to suggest that after the abolition it is, in the eyes of the law for any purpose whatever, to be regarded as existing; and, indeed, s. 5 is borne out by the provision in clause 10 of sched. 2 of the Act, for that carefully provides that existing members of the old board shall continue to "the appointed day"; the reason being obvious—that otherwise, on the abolition of the old board, its members would also, of course, have ceased to occupy the position of members of any body whatever.

On the appointed day, therefore, to my mind, under this Act, it is clear that for all purposes the old board ceased to exist, and on the same day the council came into existence as a new educational authority, with its rights and duties and its rights to take property.

That being the position of affairs, let me for a moment consider the wording of clause 1 of the 2nd schedule. It says that the property, powers, rights, and liabilities of the old board, existing at the appointed day, shall be transferred to the council. The transfer contemplated, whatever that may be, is a transfer to take place at "the appointed day." It could not take place before the appointed day by reason of the council not being in a position to take any transfer before that day. It could not take place after that because, as I have pointed out, after "the appointed day" the old board is abolished; and it is noticeable that the property which has to be transferred is, under clause 1, the property existing at the appointed day—not the property before or the property after, but the property at that precise moment. The word "transfer" as mentioned in the section is a general expression, covering not only property, but powers, rights, and liabilities. It could not mean that in respect of powers, rights, and liabilities anything in the nature of an instrument in writing should be executed. Nor can I really conceive that under this section any distinction is to be drawn between one kind of property and another kind of property which only passes at law by an instrument in writing. What the section contemplates

is an immediate passing from the old board to the council of all properties, powers, and liabilities. To my mind, under this Act of Parliament no writing or deed or any further act was contemplated. The transfer mentioned in the clause was intended to mean a transfer effected by the Act of Parliament—effected instantaneously on "the appointed day"—not before and not after. The effect of this sub-section is clearly, on the construction of the Act as a whole, that without more than the operation of the Act of Parliament all property, powers, rights, and liabilities passed by virtue of the Act to the council, that is to say, vested in the legal sense in the council, and I think that that view is borne out by other considerations. In another part of the Act the word "transfer" is used with reference to the officers employed by the old board. Clause 16 of sched. 2 says that "the officers of any authority whose property, rights and liabilities are transferred under this Act to any council shall be transferred to and become the officers of that council." There the same word "transferred" is used with regard to officers as is used with regard to duties, powers, liabilities, and property. Again, ss. 85 to 88 of the Local Government Act of 1894 are incorporated, as it were, in the Act of 1902 in this way. By sched. 2, clause 8, it is provided that the sections I have mentioned of the Act of 1894 "shall apply with respect to any transfer mentioned in this schedule," that is to say, with respect to the word "transfer" that was mentioned in the 1st section of the schedule; and, reading those sections as applying with respect to the transfer mentioned in s. 1, what do I see? In s. 86, sub-s. 1, for example, I see it is provided: "Nothing in this Act shall prejudicially affect any securities granted before the passing of this Act on the credit of any rate or property transferred to a council or parish meeting by this Act"; and in sub-s. 2 it is provided: "It shall be the duty of every authority whose powers, duties, and liabilities are transferred by this Act to liquidate so far as practicable before the appointed day, all current debts and liabilities incurred by such authority"; and in s. 88, sub-s. 1, there is this: "If at the time when any powers, duties, liabilities, debts, or property are by this Act

C. A. 1904 OLDHAM CORPORATION v. BANK OF ENGLAND. Romer L.J.

transferred to a council or parish meeting, any action or proceeding, or any cause of action or proceeding is pending or existing by or against any authority in relation thereto the same shall not be in anywise prejudicially affected by the passing of this Act, but may be continued, prosecuted, and enforced by or against the council or parish meeting as successors of the said authority in like manner as if this Act had not been passed."

Those sections strongly bear out, incorporated as they are to the extent and the manner I have indicated, the view which I think is forced upon this Court as to the true construction of clause 1 of the 2nd schedule. I might also refer, without going through them in detail, to the other provisions in this Act, for insuring the continuance without a moment's break of the rights, duties, work, and general position of the old educational authority to the new. To my mind it would be inconsistent with the general scope of that continuity if we did not give to clause 1 of the 2nd schedule the construction that I have indicated.

It is a pleasure also to think that our decision will very much enure for the benefit, as far as I can see, of everybody concerned under this Act, and will afford the greatest protection to those who have to act upon it, and it certainly will be the very best indemnity to the Bank of England, for example, which they could possibly have. It puts them in a far better position than they would be in under the interpretation adopted in the Court below.

I think for these reasons the appeal should be allowed.

COZENS-HARDY L.J. I agree, and I have very little to add. Any other view than that which has been adopted by my Lord and by Romer L.J. would, it seems to me, make this Act of Parliament absolutely unworkable. The word "abolished" in s. 5, as applied to school boards, is, no doubt, not a very happy word, and in this collocation is probably a novel word, but it seems to me that as applied to a corporation it must mean "dissolved." It must mean that on the appointed day the school board ceases to exist. There is no provision in the Act

of Parliament for the continuance of the school board; there is no possibility of any further election of members of the school board. There is nobody who could on the part of the school board do any of those acts which it was the duty of the school board to discharge before the appointed day.

It seems to me that the words in clause 1 of sched. 2 which have been so much discussed, "shall be transferred," must mean "shall vest" without more on the appointed day. One interpretation must be given to all kinds of property and to everything which is covered by clause 1 of sched. 2. It cannot reasonably be suggested that it is to have a different meaning when applied to real property than that which it has when applied to stock.

To take the case, which I ventured to put to counsel during the course of the argument, of schools with freehold property vested in school boards. I failed to obtain any suggestion of how any further deed of transfer or conveyance to the new educational authority could be obtained after the appointed day, and I certainly am not prepared so to construe this clause as to make an exception in favour of the Bank of England, because they happen to have under the Act of 1892 a section which may or may not enable the difficulty to be got over with reference to the particular stock with which that Act deals.

In my view, the conclusion at which we have arrived is very strongly borne out by s. 88 of the Act of 1894, which is made applicable to this Act, and that is a section applying, not merely to powers, duties, liabilities, and debts, but it speaks of "property . . . . by this Act transferred." That makes it more easy to read the 1st clause of that schedule in the way which I have suggested, that "shall be transferred" means "shall vest" without more on the appointed day.

Solicitors: *Treasury Solicitor; Freshfields.*

H. C. R.

KEKEWICH J.

1904

July 7.

HOOLE *v.* SPEAK.

[1902 H. 525.]

Company—Prospectus — Non-disclosure of Contracts—Directors' Liability — Advance Copy—Unauthorized Issue—Ratification—"Knowingly issuing" —Companies Act, 1867 (30 & 31 *Vict. c.* 131), *s.* 38.

A director of a company cannot be made liable under s. 38 of the Companies Act, 1867, for culpable omissions in a prospectus issued without his previous knowledge or authority, although he subsequently ratifies it and derives an advantage from it.

Advance copies of a prospectus which was eventually approved and issued by the directors without material alteration were issued without the knowledge or authority of the directors. The prospectus omitted to disclose a material contract within s. 38. Subsequently applications for shares made on the faith of the advance copies were accepted by the directors, as the Court inferred, with knowledge of all the facts:—

Held, that the directors had not "knowingly issued" the advance copies within the meaning of s. 38, and were not liable under the section in respect of that issue.

The plaintiffs were the executors of Arthur Hoole, a shareholder in the London and Northern Bank, Limited (hereinafter called the company).

The defendants were four directors of the company, namely, Messrs. Speak, Bray, Clayton, and Shepheard.

The action was brought for damages alleged to have been sustained by the plaintiffs' testator by reason of the non-disclosure of certain contracts in the prospectus, and of misstatements therein with reference to the contracts entered into by the company.

The contracts the omission of which was complained of had reference to the remuneration of one Bowden, a promoter of the company, for services rendered in connection with the purchase by the company of the business of the Leeds Joint Stock Bank, Limited.

The matters in respect of which the prospectus was impeached were the same as in the action of *Broome* v. *Speak* (1), in which

(1) [1903] 1 Ch. 586; affirmed by the House of Lords sub nom. *Shepheard* v. *Broome*, [1904] A. C. 342.

the defendants were held liable, and the defendants other than Bray were the same as in that action.

The plaintiffs proved that on October 12, 1898, advance copies of the prospectus, which was issued to the public on October 20, were issued to the shareholders of the Leeds Joint Stock Bank including the plaintiffs' testator, and that on the faith of this prospectus he, on October 14, 1898, applied for 400 ordinary shares in the company, which were allotted to him on or about October 26, and on which he paid 1000*l.*; but the defendants denied that the advance prospectus was issued with their knowledge or authority. This was the sole point which distinguished this case from *Broome* v. *Speak*. (1)

The facts relating to the issue of the advance prospectus were as follows: The form of the prospectus, which had been discussed at several meetings of the directors, was again discussed at a meeting held on October 10, 1898. At this meeting the defendants Speak and Shepheard were present during the whole time; the defendant Bray was present during the greater part of the time, but whether he was present while the prospectus was discussed was in dispute; the defendant Clayton was not present at all. Bowden was also present. Bray, who was chairman of the Leeds Joint Stock Bank, attended the meeting in the interests of that bank, and he did not become a director of the London and Northern Bank until October 20. The question of the terms of Bowden's remuneration, which were embodied in a contract of September 21, 1898, was first discussed, and ultimately at Bray's instance this contract was cancelled and a verbal contract was substituted. The draft prospectus was then submitted to the meeting. The prospectus, as it then appeared, disclosed the contract of September 21; but after some discussion this contract was struck out, and all reference to the subject of Bowden's remuneration was omitted. Some minor alterations were also agreed to and, as stated in the minutes, "the prospectus as altered was provisionally approved."

(1) [1903] 1 Ch. 586; affirmed by the House of Lords sub nom. *Shepheard* v. *Broome*, [1904] A. C. 342.

KEKEWICH J.
1904
HOOLE v. SPEAK.

It appeared that the directors contemplated issuing advance copies of the prospectus to the shareholders of the Leeds Joint Stock Bank, and that Bowden had previously prepared for the use of these shareholders a special form of application for shares headed "Special application form from shareholders of the Leeds Joint Stock Bank"; but this question had never been submitted to a meeting of the board. Immediately after the meeting of October 10 Bowden converted the prospectus as altered into a complete prospectus to be issued in advance to the shareholders of the Leeds Joint Stock Bank, and for this purpose he added the words, "Advanced prospectus to the shareholders of the Leeds Joint Stock Bank, Limited," and made other consequential alterations; but in all material matters the prospectus was the same as the prospectus which was subsequently issued by the directors to the public, and which was the subject of the action in *Broome* v. *Speak*. (1) He had this prospectus printed, and without any authority from the directors sent a copy with the special form of application to each of the shareholders of the Leeds Joint Stock Bank. The prospectus which was issued to the public was finally approved at a meeting of the directors held on October 20. At a board meeting held on October 26, 27, at which all the defendants were present, the directors proceeded to allotment, and considered the applications of the shareholders of the Leeds Joint Stock Bank as well as those of the general public, and it was assumed by the Court that the facts relating to the issue of the advance prospectus had become known to the defendants before Hoole's shares were allotted to him.

Astbury, K.C., Roskill, K.C., and *A. B. Cane*, for the plaintiffs. Subject to the question whether the defendants authorized the issue of this prospectus, this case is covered by *Broome* v. *Speak*. (1) The defendants ratified and adopted this prospectus, and they cannot now be heard to say that it was not issued with their authority.

(1) [1903] 1 Ch. 586; affirmed by the House of Lords sub nom. *Shepheard* v. *Broome*, [1904] A. C. 342.

[They cited *Emma Silver Mining Co.* v. *Lewis & Son* (1); *Arnison* v. *Smith* (2); *Smith* v. *Chadwick* (3); *Baty* v. *Keswick*. (4)]

O. L. Clare, for the defendant Speak.

Gore-Browne K.C., *Muir Mackenzie*, and the *Hon. Frank Russell*, for the defendant Bray.

Felix Cassel, for the defendants Clayton and Shepheard.

KEKEWICH J., after observing that the action was launched both under s. 38 of the Companies Act, 1867, and under s. 3 of the Directors Liability Act, 1890, said that he was satisfied upon the evidence that the plaintiffs' testator had subscribed for shares on the faith of the advance prospectus and that the plaintiffs were entitled to recover damages against those who had issued it. Upon the question whether the issue of this particular prospectus was authorized by the defendants, his Lordship referred to the meeting of October 10 and to the issue of the prospectus by Bowden to the shareholders of the Leeds Joint Stock Bank, and he continued as follows :—

For the issue of that prospectus Bowden had no authority whatever. The prospectus had been provisionally approved, but there was no final approval of the particular form of prospectus to be issued to this limited class of shareholders. These four defendants gave no authority for that; and how can it be said that they are liable for a document which they did not authorize? That is really an end of the plaintiffs' case. But then another point is made. It is said that although the defendants did not authorize the issue of the prospectus, they ratified it and took advantage of it. In one sense that is quite true. It must have been called to their attention at a very early date. I think it is a reasonably clear inference that those who were present at the meeting of October 26, when Mr. Hoole's application was accepted, had the facts brought to their knowledge, and knew that some persons had applied for shares on the faith of the advance prospectus issued to the

(1) (1879) 4 C. P. D. 396.
(2) (1889) 41 Ch. D. 348.
(3) (1882) 20 Ch. D. 27; (1884) 9 App. Cas. 187.
(4) (1901) 85 L. T. 18; [1901] W. N. 167.

KEKEWICH J. 1904 HOOLE v. SPEAK.

shareholders of the Leeds Joint Stock Bank; and if this were a question of contract, as at present advised, I should be bound to hold that the defendants had ratified this contract entered into on their behalf, and that they would be liable as contracting parties from the first. But it is not a question of contract. It arises out of a contract, but it is none the less a tort because it arises out of a contract. I asked Mr. Astbury whether he could find me any authority to shew that there was a civil remedy against a tortfeasor on the ground of his being an accessory after the fact; but he was unable to produce any. But we need not go into that question. I am prepared to base my judgment on the language of s. 38 of the Act of 1867. The statute speaks of "directors knowingly issuing the same," and therefore presupposes knowledge on the part of the directors, and it points to an offence being committed at the time of the issue. It appears to me that I should be contradicting the language of the statute entirely, and should be extending the operation of that rather harsh measure, if I were to hold directors liable for a prospectus which they did not authorize on the ground that they had afterwards adopted it, or had even derived some benefit from it. The action must be dismissed with costs.

Solicitors: *Allen & Son, for Jones & Wells, East Retford; Waterhouse & Co.; Helder, Roberts & Co., for Simpson & Co., Leeds.*

H. B. H.

In re TAYLOR'S AGREEMENT TRUSTS.

BUCKLEY J.

1904

April 23; *May* 7; *June* 4.

[1904 T. 064.]

Company—Winding-up—Contract to sell Assets—Letters Patent—Omission to assign before Dissolution—Vesting Order—Registration—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *ss.* 142, 143—*Trustee Act*, 1893 (56 & 57 *Vict. c.* 53), *ss.* 25, 35—*Patents, Designs, and Trade Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *ss.* 23, 87, 90.

The liquidators of a company had agreed to sell to a purchaser letters patent of which the company was the registered owner, but the company was dissolved without any assignment having been executed. The purchaser, who was unable to get himself registered as proprietor of the letters patent, presented a petition asking for an order under s. 35 of the Trustee Act, 1893, vesting them in him:—

Held, that when the company was dissolved the legal interest in the letters patent, if it vested anywhere, vested in the Crown, and that in that case, although the Crown did not act as trustee, it could not be said within s. 35 of the Trustee Act, 1893, that the trustee "could not be found"; if the legal interest did not vest in the Crown there was no trustee, and again it could not be said that the trustee "could not be found," because there being no trustee it could not be predicated of him that he "could not be found"; therefore a vesting order could not be made under s. 35.

In re General Accident Assurance Corporation, [1904] 1 Ch. 147, not followed.

Held, further, that a new trustee could not be appointed under s. 25 of the Trustee Act, 1893; and that the consent of the Attorney-General would not give the Court jurisdiction.

Quære, whether the patent had not merged as soon as the legal interest vested in the Crown if it did so vest.

PETITION.

The Niger Patent Elastic Enamel Company on August 28, 1903, passed an extraordinary resolution for the voluntary winding-up of the company, and appointed two persons as liquidators. At that time the company was the registered proprietor of letters patent for an invention. On September 16, 1903, the liquidators entered into an agreement in writing with Micheal [*sic*] Condron (the inventor of the enamel, and original proprietor of the patent) for the sale to him of the patent and the goodwill, plant, and furniture of the company. The agreement was signed by the liquidators and delivered to Condron in

BUCKLEY J.
1904
TAYLOR'S AGREEMENT TRUSTS, *In re.*

return for the purchase-money which he then paid to them. By inadvertence no further assignment or transfer of the letters patent was executed.

On November 23, 1903, the meeting of the company required by s. 142 of the Companies Act, 1862, was duly called, and the other requirements of that section were complied with. The liquidators on November 24, 1903, made the return to the Registrar of Joint Stock Companies required by s. 143 of the Companies Act, 1862, with the result that at the expiration of three months thereafter the company was dissolved. There was therefore no one in existence who could execute an assignment of the letters patent to Condron so as to enable him to obtain registration.

He accordingly presented a petition intituled "In the matter of the trusts created by an agreement dated the 16th day of September, 1903, and made between Alfred Taylor and Charles Frederick Bromilow, the liquidators of the Niger Patent Elastic Enamel Company, Limited, and Micheal Condron, affecting (inter alia) an invention for an improved preservative compound and the letters patent granted in respect thereof and numbered 9936 of 1901. In the matter of the Trustee Act, 1893, and in the matter of the Patents, Designs, and Trade Marks Acts, 1883 to 1901." The petitioner prayed, "That an order may be made under ss. 35 and 36 of the Trustee Act, 1893, and under s. 90 of the Patents, Designs, and Trade Marks Act, 1883, as amended by s. 23 of the Patents, Designs, and Trade Marks Act, 1888, that the said invention . . . . and the letters patent . . . . may vest in the said Micheal Condron for all the estate of the Niger Patent Elastic Enamel Company, Limited, therein, and that the register of patents . . . . be varied by substituting the name of the said Micheal Condron as the registered proprietor of the said patent for that of the Niger Patent Elastic Enamel Company, Limited."

The petition was not served on any person.

A. J. Walter, for the petitioner. Sect. 35 of the Trustee Act, 1893, empowers the Court to make a vesting order in respect of a chose in action where a trustee entitled thereto

"cannot be found." This company was a trustee of the letters patent for the petitioner, and as it has been dissolved by the operation of s. 143 of the Companies Act, 1862, it "cannot be found." The Court can therefore make an order vesting the letters patent in the petitioner.

Farwell J. took this view and made a vesting order in *In re General Accident Assurance Corporation.* (1)

[BUCKLEY J. With every respect to Farwell J., I am unable to follow that decision. "Vesting" means taking something out of one person and putting it into another. This company has ceased to exist. Wright J. in *In re Higginson and Dean* (2) discusses the authorities with reference to what becomes of property vested in a corporation at the time of its dissolution.]

The Crown has not been served in this case, as the case seemed to be within the decision of Farwell J.

[*Frank Evans,* amicus curiae, referred to *In re Bond* (3) and *Pryce-Jones* v. *Williams.* (4)]

BUCKLEY J. I will let this petition stand over in order that it may be served upon the Crown. The petitioner will have to satisfy me that the Crown is a trustee, and that I can, with the consent of the Crown, if it should be given, make a vesting order. I regret that I do not feel myself able to follow the decision of Farwell J. in *In re General Accident Assurance Corporation.* (1) It seems to me that in order to be able to say that a trustee cannot be found one must be able to predicate that there is a trustee, but that it is not known where he is. If the dissolved company in this case is, or rather was, the trustee, I am not ignorant where it is. I know that it is nowhere; it does not exist. It is not a question of finding the trustee. The company cannot, I think, be described as a trustee "who cannot be found." If, on the other hand, the legal estate in the patent has by reason of the dissolution of the company vested in the Crown, and the Crown is the trustee, then again the Crown is not a trustee "who cannot be found."

The petition must stand over; and if the petitioner can bring

(1) [1904] 1 Ch. 147.
(2) [1899] 1 Q. B. 325.
(3) [1901] 1 Ch. 15.
(4) [1902] 2 Ch. 517.

BUCKLEY J.
1904
TAYLOR'S AGREEMENT TRUSTS, *In re.*

here a person as to whom he can satisfy me that he is a trustee, I may be able to dispose of the matter.

F. E.

The petition, therefore, stood over, was served upon the Crown, and came before the Court again on May 7.

A. J. Walter, for the petitioner. We have applied under s. 87 of the Patents, Designs, and Trade Marks Act of 1883, but we have not succeeded in obtaining registration. The petition is intituled under the Patents, Designs, and Trade Marks Acts as well as under the Trustee Act. It may be that we can apply as persons aggrieved under s. 90 of the former Act to have the register rectified.

[BUCKLEY J. I doubt whether the case is within s. 90. I cannot appoint a new trustee under s. 25 of the Trustee Act, for there is in a sense an existing trustee.]

R. J. Parker, for the Crown. I do not admit that legal estates are bona vacantia which pass to the Crown unless the beneficial interest passes also. But, assuming that the legal estate in these letters patent has passed to the Crown, the question is how to get the petitioner out of his difficulty. The Crown will not execute an assignment of the letters patent; and it is difficult to obtain a regrant of a patent. Perhaps the Attorney-General will consent to a vesting order being made. The best plan, however, will be to adopt a course which has sometimes been taken in the case of trade-marks, and get the Board of Trade to direct the comptroller to register the petitioner, who is the equitable owner, as the proprietor.

A. J. Walter. That would be sufficient for the petitioner.

BUCKLEY J. stated the facts, and proceeded:—The jurisdiction to make a vesting order arises under s. 35 of the Trustee Act, 1893, and the words relied upon are those in s. 35 (*c*), that a trustee "cannot be found." The context in which those words occur is this: "Where a trustee (*a*) is an infant, or (*b*) is out of the jurisdiction of the High Court, or (*c*) cannot be found." To my mind the words "cannot be found" in that context mean that the trustee is, or presumably is, somewhere, but that you do not know where he is; that the difficulty

arises, not because he is nowhere, but because you do not know where to find him. I regret very much that I find myself unable to concur in the decision on that point which I understand my brother Farwell arrived at in *In re General Accident Assurance Corporation.* (1) It seems to me, on reading the Trustee Act, 1893, that the case which has here arisen was not thought of and is not provided for. The fact that this limited company, which was a trustee, is no longer existent does not, in my opinion, satisfy the words that it is a trustee who "cannot be found." Further, when the corporation was dissolved, the legal interest in the patent, if it vested anywhere, vested, I think, in the Crown. If it did, and if the Crown can properly be called a trustee, then I know where the trustee is.

There is this further difficulty: assuming the legal interest to be so vested in the Crown that it would be a trustee if such a thing were possible, yet the Crown is entitled to say (although it does in general give effect to trusts) that it is not bound by the trusts, and in that sense is not a trustee.

Then it has occurred to me that it might be possible to give leave to amend the petition by asking for the appointment of a new trustee, and thereupon to make a vesting order. That turns on s. 25 of the Act which enables me to appoint a new trustee, although there is no existing trustee. Now in a sense those words are satisfied—that is to say, the corporation has disappeared, is not existing, and the Crown, if the legal estate is vested in the Crown, is not in a strict sense a trustee. The Crown is existing, but may be said not to be a trustee; so that I may say in a sense there is no existing trustee. If that is so—I do not say it is, because of course the Crown might be a trustee if it was so minded—but supposing that condition to be satisfied, could I even then appoint a new trustee and make a vesting order as against the Crown? Plainly not. The Crown is not bound by the Act of Parliament.

Then Mr. Parker suggests, to get over the difficulty which everybody desires to do, that the Attorney-General might consent to my making a vesting order and waive the right of the Crown. But could I even then make a vesting order? It

(1) [1904] 1 Ch. 147.

BUCKLEY J. 1904 TAYLOR'S AGREEMENT TRUSTS. *In re.*

seems to me that I could not. The concession of counsel for the Crown could only be that the Crown, although not bound by the Act, would not raise the point. Does that give me jurisdiction? Certainly not. I cannot enlarge the Act of Parliament. My powers would remain where they were. If the Crown were minded to deal with the matter by assignment or in some other way, well and good; but I cannot make a vesting order.

Then there is this further difficulty, which seems to me formidable. Directly the legal interest vested in the Crown, if it did so vest, the patent merged, for the Crown cannot be a grantee from itself. Then where is the patent? That goes to the existence of the subject-matter upon which I am asked to make a vesting order.

On all these grounds it seems to me that it is impossible on this petition to assist the petitioner, although I should wish to do so if I could in any way, unless this course be possible, and it is said that is possible. It is perfectly obvious what the applicant's rights are. He is entitled to the patent unless the Crown is going to set up some claim of merger on the principles I have stated. If the Crown does not set up such a claim, it may be possible for the comptroller to exercise his jurisdiction over the register by entering the applicant's name as the proprietor of this patent. If he will do so, if any technical impediments in the way are removed that will resolve the difficulty; but that is for the comptroller, and not for me. In that view I will not dismiss the petition now, though I do not see my way to make any order on it; but I will let it stand over again to see if anything can be done to get over the difficulty.

June 4. It was now stated to the Court that the Board of Trade, acting on the suggestion of counsel to the Treasury, had directed the comptroller to register the name of Micheal Condron as proprietor of the letters patent. The petition was accordingly dismissed.

Solicitors: *A. M. Longhurst, for Mackay, Taylor & Goffey, Liverpool; Solicitor to the Treasury.*

H. C. R.

In re PALMER'S DECORATION AND FURNISHING COMPANY.

BUCKLEY J.
1904
July 5, 6.

Company — Debentures — Registered Holder — Equities of Company against Transferor—Rights of Transferee for Value without Notice.

A company issued to B. debentures each of which contained a covenant to pay the moneys thereby secured, in accordance with the conditions indorsed thereon, to B. or other the registered holder for the time being. The principal moneys secured became immediately payable in the event of a resolution for winding-up being passed. The conditions indorsed provided as follows :—

"(3.) The registered holder . . . . will be regarded as exclusively entitled to the benefit of this debenture, and all persons may act accordingly; and the company shall not be bound to enter in the register notice of any trust or to recognise any right in any other person save as herein provided.

"(4.) Every transfer of this debenture must be in writing under the hand of the registered holder . . . . and must be delivered at the registered office of the company with . . . . such evidence of identity or title as the company may reasonably require, and thereupon the transfer will be registered."

"(8.) The principal moneys and interest hereby secured will be paid without regard to any equities between the company and the original or any intermediate holder thereof, and the receipt of the registered holder for such principal moneys or interest shall be a good discharge to the company therefor."

After a resolution for winding up the company had been passed, B. transferred the debentures for value to C., who took without notice of any defect in the title of B. thereto.

Notice of the transfer was given to the liquidator, but no demand for registration of the transfer was made.

On a claim by C. in the winding-up that he was entitled to the benefit of the debentures, the Court found that B. had paid nothing for them, but had obtained them from the company by misrepresentation :—

Held, that, notwithstanding the conditions, the rights of the company against B. prevailed over the title of C., and that C. was not entitled to the benefit of the debentures.

In re Goy & Co., [1900] 2 Ch. 149, distinguished.

PALMER'S DECORATION AND FURNISHING COMPANY, LIMITED, was registered under the Companies Acts, 1862 to 1900, on February 14, 1902, with articles of association which provided

BUCKLEY J. 1904 PALMER'S DECORATION AND FURNISHING COMPANY, *In re.*

that, subject as thereinafter provided, Table A in the 1st schedule to the Companies Act, 1862, should apply to the company, with the result that clause 53 of Table A applied. Clause 53 is as follows: "Until directors are appointed the subscribers of the memorandum of association shall be deemed to be directors." One of the objects of the company was to purchase from the owner, Percy G. C. Burnand, and carry on as a going concern, a decorating and furnishing business carried on under the name of Palmer & Co.

On February 14, 1902, Henry Ernest Gaze, who had for some time previously been acting as manager of the business of Palmer & Co. for P. G. C. Burnand, the intending vendor, went to James Tilley Shand and borrowed 1800*l.* for the purposes of the company, which had then just been or was just going to be incorporated. Shand gave a cheque for the amount drawn in favour of "Palmer's Decoration and Furnishing Company, Limited, or order."

The cheque was indorsed by the company "per H. E. Gaze," and paid into a banking account, which Buckley J. held to be a banking account of the limited company.

In exchange for the cheque Gaze drew and gave to Shand three promissory notes for 600*l.* each, payable at six, twelve, and eighteen months respectively—namely, on August 17, 1902, February 17, 1903, and August 17, 1903. The promissory notes were signed by Gaze "For Palmer's Decoration and Furnishing Company, Limited.—Henry E. Gaze, manager," and were payable at a bank in Dublin. At that time no directors of the company had been appointed, and Gaze (who was not one of the signatories of the memorandum of association) was not a person who could be deemed a director under clause 53 of Table A, and had no authority to bind the company by the promissory notes.

One of the promissory notes was paid in August, 1902, but the other two were not paid.

By clause 2 of an agreement in contemplation early in 1902, but the execution of which was considerably delayed, and which was ultimately dated May 6, 1902, the consideration payable to Burnand for the sale of the business was 1893*l.*, to

be satisfied by the issue to him of debentures for 400*l.* and 1493 fully paid 1*l.* shares in the company.

By clause 3 of the agreement the company was to pay and discharge the debts incurred by the vendor in connection with the business specified in a schedule to the agreement, and, save as therein stated, the vendor was to bear and pay all debts and liabilities of the business incurred up to December 9, 1901, and, in the event of the vendor discharging any of the debts for which under the terms of the agreement the company was liable, the company was to repay the same to him.

By clause 5 it was provided that the purchase was to be completed in May, 1902.

By clause 6, until completion possession was to be retained by the vendor, who was to carry on the business as theretofore, but as from December 9, 1901, he was to be deemed to have been carrying it on on behalf of the company, and was to account and be entitled to be indemnified accordingly.

By clause 10 he was to subscribe or find cash subscribers for 1800*l.* in debentures of the company.

Gaze was appointed sole director of the company on April 2, 1902. He paid the first promissory note, and the company had the money, and in effect ratified the loan. Burnand in the meantime had begun to press the company for the issue to him of the debentures to which he would be entitled on payment of the 1800*l.* under clause 10 of the agreement, although it had not then been signed. He claimed that he was entitled as having paid moneys for the company which under the agreement the company was bound to pay to him.

In consequence of this claim the accountant of the company was instructed to investigate the company's accounts in order to ascertain whether Burnand's claim was well founded; and minutes of a directors' meeting held on May 8, 1902, stated that, it appearing by a statement by the company's accountant that Burnand had expended 1510*l.* in respect of matters for which the company was liable under the purchase agreement, and there being also due to him 400*l.* debentures, part of the consideration for purchase under clause 2, it was resolved that eleven debentures of 100*l.* each be allotted and issued to him

BUCKLEY J. 1904 PALMER'S DECORATION AND FURNISHING COMPANY, *In re.*

in satisfaction pro tanto of money paid by him on the company's behalf, which were to be treated as compliance with his undertaking to place debentures under clause 10 of the agreement. In fact, the payments which the accountant supposed he had checked were not made out of Burnand's money at all, but out of the company's moneys. The eleven debentures were issued to P. G. C. Burnand accordingly.

The debentures were all in the same form, and each of them contained a covenant by the company for payment of the moneys secured thereby, in accordance with the conditions indorsed thereon, to "———, or other the registered holder for the time being." Amongst the indorsed conditions were the following:—

"3. The registered holder or his legal personal representatives will be regarded as exclusively entitled to the benefit of this debenture, and all persons may act accordingly; and the company shall not be bound to enter in the register notice of any trust or to recognise any right in any other person save as herein provided.

"4. Every transfer of this debenture must be in writing under the hand of the registered holder or his legal personal representative, or, if the registered holder is a corporation, under the seal of such corporation. The transfer must be delivered at the registered office of the company with a fee of 2*s.* 6*d.*, and such evidence of identity or title as the company may reasonably require, and thereupon the transfer will be registered, and a note of such registration will be indorsed hereon. The company shall be entitled to retain the transfer."

"6. No transfer will be registered during the seven days immediately preceding the days by this debenture fixed for payment of interest."

"8. The principal moneys and interest hereby secured will be paid without regard to any equities between the company and the original or any intermediate holder thereof, and the receipt of the registered holder for such principal moneys or interest shall be a good discharge to the company therefor."

The principal moneys secured by the debentures were to

become payable if (amongst other events) an effective resolution was passed for the winding-up of the company.

On February 5, 1903, the company went into voluntary winding-up, and Gaze was appointed liquidator. On or about November 30, 1903, Burnand was adjudicated a bankrupt.

On December 3, 1903, E. H. R. Trenow was appointed liquidator in the place of Gaze. The debentures which were issued to Burnand came into the possession of R. E. Campbell under the following circumstances. In September, 1900, R. E. Campbell, in respect of a debt due to him, received a guarantee of certain underwriters including Burnand, and Burnand deposited with him some shares in a steamship company. On July 5, 1902, with the consent of all persons concerned, Burnand withdrew certain of the steamship company's shares and substituted in place of them the debentures already mentioned. On April 26, 1903, Campbell, without notice that the title of Burnand could in any way be disputed, took a transfer from Burnand of the debentures. Notice of the transfer was given to the liquidator (who was asked in a letter from Campbell not to pay to Burnand any of the moneys due under the debentures without notice to Campbell), but the transfers were never registered. The debt in respect of which the debentures were deposited had not been discharged.

On February 11, 1904, the liquidator took out a summons which, as amended, asked for the determination of the question whether Campbell, as assignee of Burnand under the transfer of April 26, 1903, was entitled to the eleven debentures subject to or discharged from the equities and rights between the company and Burnand, and whether Shand was entitled to enforce any claim against the company in respect of the promissory notes.

Sargant, for the liquidator. Campbell is only an equitable assignee of the debentures—an assignee of a chose in action who takes subject to the equities and rights affecting it in the hands of the assignor; and, under circumstances very like those of the present case, it has been held that against the debenture debt a company can set off calls due to the company

BUCKLEY J. 1904 PALMER'S DECORATION AND FURNISHING COMPANY, *In re.*

from the original holder before notice of the assignment is given to the company: *Christie* v. *Taunton, Delmard, Lane & Co.* (1) The right of set-off is also exemplified by *In re South Blackpool Hotel Co.* (2) Where debentures were issued under circumstances constituting a fraud on the company, the defence that the transferee was a bonâ fide purchaser for value, without notice, failed: *Athenæum Life Assurance Society* v. *Pooley*. (3) The conditions of the debentures do not help Campbell, for he is neither a registered holder of the debentures nor a person entitled by estoppel to the rights of a registered holder. [He also referred to *Simm* v. *Anglo-American Telegraph Co.* (4); *Balkis Consolidated Co.* v. *Tomkinson* (5); Palmer's Company Precedents, 8th ed. Part III. p. 19.]

Waggett, for Campbell. Having regard to the conditions, Campbell is entitled to his debentures, although his transfer has not been registered, notwithstanding any equities which the company may have against Burnand: *In re Goy & Co.* (6); *In re Brown & Gregory, Ld.* (7) He is entitled to be registered, and after registration the conditions are applicable.

Schiller, for Shand, in support of the claim to prove on the two notes.

Hughes, *K.C.*, and *Leuchars*, for guarantors of the solvency of underwriters of the promissory notes. Campbell cannot have greater rights than Burnand, for his transfer has not been registered, and the conditions are only applicable in favour of a registered holder.

Sargant, in reply. In *In re Goy & Co.* (6) the debentures were valid, and the title of the transferor to them was unimpeachable. Here the company has the right to set aside the debentures for fraud—a good legal and equitable ground. Burnand could not have relied on the debentures, and Campbell has no higher right.

BUCKLEY J., after stating the facts with regard to the claim of Shand to prove in respect of the two promissory notes, and

(1) [1893] 2 Ch. 175.
(2) (1869) L. R. 8 Eq. 225.
(3) (1858) 3 De G. & J. 294.
(4) (1879) 5 Q. B. D. 188.
(5) [1893] A. C. 396.
(6) [1900] 2 Ch. 149.
(7) [1904] 1 Ch. 627.

holding that the company had ratified all the notes, and that Shand was entitled to prove in respect of the two outstanding notes, and that if Burnand had been the claimant he would not have been entitled to anything, as he had not paid anything in respect of the debentures and had obtained them by misrepresentation, and after pointing out that Campbell, although he had given notice to the liquidator not to pay Burnand, had not made any demand for registration of the transfer, proceeded as follows:—

The question then is, whether Campbell has any better right in respect of the debentures than Burnand had. It is necessary, in order to decide this question, to look at the conditions and to see what the rights are. The company covenants to pay the principal moneys secured to Burnand "or other the registered holder for the time being." Then the relevant conditions are those numbered 3, 4, and 8 [which his Lordship read]. Now supposing Campbell had made a demand upon the liquidator for registration of his transfer, would he, or his transferor on his behalf, have had the right to compel the company to register the transfer so as to do away with the rights which the company possessed as between the transferor and itself? In my judgment he would not. The object of the conditions as here expressed is that, if the transferee becomes the registered holder of the debentures, the company is precluded as from the date of registration from setting up as against the transferee any rights it may have possessed as against the original holder; but that does not mean that the transferor or the transferee is given the right to insist on the registration of the transfer so as to exclude the company's equities or rights. There may be a form of debenture which excludes in favour of a transferee the company's rights against the transferor although registration of the transfer has not yet taken place; but a debenture in the form before me is only a protection to the transferee when he has got upon the register. Mr. Campbell's counsel contends that the transferee is already protected, and *In re Goy & Co.* (1) is cited as an authority to support that view; but I do not think that Stirling J. in that

(1) [1900] 2 Ch. 149.

BUCKLEY J.
1904
PALMER'S DECORATION AND FURNISHING COMPANY, *In re.*

case intended to decide what is here contended for. In that case a resolution for the voluntary winding-up of the company was passed on May 12, 1898, and thereupon the principal secured by the debentures became payable. On June 11 judgment in a debenture-holder's action was pronounced. On September 14 Chandler, a debenture-holder, received an advance on the security of a mortgage and transfer of his debentures. On September 22 the transferee's solicitor sent the transfer to the liquidator for registration, and, as it was thought that, having regard to the judgment in the action, there was a difficulty about registration, gave the liquidator formal notice on October 14 requiring him to register the transfer. About that time the liquidator conceived that he had a claim against the transferor for misfeasance, and he accordingly took steps which resulted in Chandler being ordered in March, 1899, on a summons in the winding-up, to pay a sum of 300*l.* to the liquidator. Substantially the transferee demanded registration when he sent in the transfer on September 22. It is noticeable that when the transfer was sent in for registration the company was not aware of and was not setting up any equities between itself and the transferor. It was in that state of facts that Stirling J. said (1): "It seems to me that condition 4"—the same as in the present case—"imposes an absolute obligation on the company to register a transfer upon that transfer being delivered at the registered office." I do not think he meant to say that if the company then had and asserted an equity against the transferor, and refused to register the transfer on that ground, the transferee would have the right to say to the company, "You shall register so as to oust the company's equity." Further, so far as the report of *In re Goy & Co.* (2) states the case, the conditions of the debentures there were not identical with those in the debentures before me. The words "and the receipt of the registered holder for such principal moneys or interest shall be a good discharge to the company therefor" which I have here do not appear in the debentures in *In re Goy & Co.* (2) The registered holder seems to be the only person contemplated by those words. I do not

(1) [1900] 2 Ch. 154. (2) [1900] 2 Ch. 149.

think that Stirling J. meant to say that under conditions such as these the company is precluded from setting up against the unregistered transferee equities which it has against the transferor, and on that ground refusing to register. Moreover, by condition 4 the company is entitled to require evidence of identity and title. That affords ample room for the company to say that by reason of the company's equity the title is not clear. It seems to me that even if Campbell had required registration the company would have been entitled to enforce its equities; but in fact he never did claim registration, and I think the company is entitled to say that Burnand is the registered holder, that it has an equity against Burnand, and that Campbell is in no better position than Burnand.

In my judgment, therefore, the claim of Campbell fails, and that of Shand succeeds, and Shand is entitled to add his costs to his debt.

Solicitors for the liquidator: *Paines, Blyth & Huxtable.*
Solicitors for Campbell: *Campbell, Baird & Perkins.*
Solicitor for Shand: *Richard F. Yeo.*
Solicitors for other persons: *G. F. Hudson, Matthews & Co.*

F. E.

BUCKLEY J.

1904

July 13, 14.

In re IRWIN.
IRWIN *v.* PARKES.

[1904 I. 482.]

Settlement—Construction—Equitable Estate in Fee—Conveyance to Trustees—Omission of Words of Limitation.

By a post-nuptial settlement made in 1884 between W. C. Irwin of the one part, and trustees "whom and their executors or administrators are intended to be hereinafter included in the designation of the said trustees" of the other part, it was recited that Irwin was absolutely entitled to freehold hereditaments, "which said freehold property" he was desirous to settle in favour of his wife and children. It was then witnessed that in pursuance of such desire he assigned the "said freehold hereditaments" to the trustees (without the word "heirs"), upon trust for sale and investment and to pay the income to Mrs. Irwin for life and then to the settlor for life and then for their children. The settlement contained a proviso that if any present or future trustee died or wished to retire it should be lawful for the surviving or continuing trustee or, if there should be no continuing trustee, for the retiring trustee to appoint another trustee in his place, and that the trust funds and premises should thereupon be vested in the new trustees. Amongst the settlor's freeholds were some in which he only had an equitable estate :—

Held, that by reason of the absence of words of limitation there passed to the trustees merely an estate in the settlor's equitable freeholds for the lives of the trustees named in the deed and the survivor of them.

ORIGINATING SUMMONS.

The question in this case was whether equitable freeholds had passed for an estate in fee simple to trustees under an assignment in a post-nuptial settlement without words of limitation. The settlement was made on November 25, 1884, between William Charles Irwin of the one part, and Thomas Boucher Irwin and William Charles Parkes, "whom [*sic*] and their executors or administrators are intended to be hereinafter included in the designation of the said trustees, of the other part. Whereas the said William Charles Irwin is absolutely possessed of and entitled to the freehold hereditaments and premises mentioned in the first schedule hereto, and also to the household furniture, plate, goods, chattels, and effects mentioned in the second schedule hereto, and now in and upon his dwelling-house No. 2, Carisbrook Villas aforesaid,

which said freehold property, household furniture, and effects he is desirous to settle in manner hereinafter provided in favour of his wife Ellen Irwin and their present or any future children, and the said parties of the other part have consented to become trustees for the purposes aforesaid: Now this indenture witnesseth that in pursuance of such desire, and in consideration of his natural love and affection for his wife and issue, the said William Charles Irwin doth hereby assign the said freehold hereditaments and premises, and also the said furniture, plate, goods, chattels, and effects, all of which are hereinafter designated as the freeholds and household effects, unto the said trustees," without words of limitation, "to hold the same or the proceeds thereof upon the trusts and for the intents and purposes hereinafter declared, that is to say, upon trust for the said trustees to stand possessed of and retain the said freeholds and household effects so long as they shall think desirable, and at their absolute discretion to sell all or any part of the same," and to invest the moneys to arise from such sale as therein mentioned, and during the joint lives of the said William Charles Irwin the elder and Ellen Irwin his wife to pay the annual produce thereof to the said Ellen Irwin as therein mentioned, and in case (which happened) the said Ellen Irwin should die in the lifetime of the said William Charles Irwin the elder, then upon trust that the trustees should receive the annual proceeds and pay the same to the said William Charles Irwin the elder for his life or until he should become bankrupt, and after that event, or after the decease of the survivor of them the said William Charles Irwin the elder and Ellen Irwin, upon trust for all or any of the children of the said William Charles Irwin the elder and Ellen Irwin who being a son or sons should attain the age of twenty-one years or being a daughter or daughters should attain that age or marry under that age equally. The settlement then contained maintenance and accumulation clauses, and a provision that if no child attained twenty-one the funds were to be held in trust for the persons who at the time of the failure of the trust would have been entitled thereto under the Statute of Distribution if William Charles Irwin the elder

BUCKLEY J.
1904
IRWIN, *In re.*
IRWIN *v.* PARKES.

had died intestate; and it was thereby provided that notwithstanding the previous trust for sale the said trustees should not sell the said freeholds, furniture, chattels, and effects so long as the said Ellen Irwin should be living and should be able and willing to retain the actual possession and enjoyment of the same without her consent in writing, and in the meantime should hold the same upon trust for such persons as Ellen Irwin should with the consent of the trustees or the survivor of them from time to time or at any time appoint, and subject thereto for the separate use of Ellen Irwin. The settlement also contained a clause "that in case the said trustees or trustee hereby appointed or any future trustees or trustee to be appointed under this present power shall happen to die or be desirous of being discharged from or decline or become incapable to act in the trusts hereby in them respectively reposed as aforesaid, or shall go to reside beyond the seas before the said trusts shall be fully performed or discharged, then and so often as the same shall happen it shall be lawful for the surviving or continuing trustee, or if there shall not be a continuing trustee then for the declining or retiring trustee, by any deed or deeds from time to time to appoint any other fit person or persons to supply the place of the trustee so dying or desiring to be discharged or refusing or declining or becoming incapable to act as aforesaid, and that when and as soon as conveniently may be after such appointment the said trust moneys, securities, funds, and premises shall be legally and effectually vested in such new trustee to, for, and upon such and the same trusts, intents, and purposes as are hereinbefore declared concerning the same or such of them as shall be then subsisting and capable of taking effect, and that every such new trustee shall and may either before or after such vesting as aforesaid in all things act and assist in the execution of the trusts to which he shall be so appointed as fully and effectually to all intents and purposes whatsoever and shall be vested with the same powers and authorities as fully and effectually in all respects and to all intents as if he had been hereby originally appointed a trustee."

The first schedule to the said indenture was as follows:

"Three freehold houses and premises Nos. 2, 3, and 4, Ravenscroft Villas, Colliers Wood, aforesaid, Nos. 1, 2, 3, and 6, Lawn Villas, Colliers Wood, aforesaid, 1 and 2, Carisbrook Villas, Colliers Wood, aforesaid, and one house in the Wilton Road, Colliers Wood. Also three plots of freehold land in Devonshire Road, one in Wilton Road, and two in Harwood Road, Colliers Wood, aforesaid, and nine plots in Hamilton Road, eight in Quick's Road, and three in Merton Road, Wimbledon, Surrey."

The first nine houses mentioned in the first schedule to the settlement were purchased by the settlor in or before the year 1878, and in that year were mortgaged by him for 1000*l*. This mortgage had never been paid off; so the settlor was at the date of the settlement only entitled to the equity of redemption in the nine houses.

In 1862 the settlor had contracted to purchase the eight plots of land in Quick's Road, and the purchase-money was payable by instalments. Four of the plots were conveyed to him in 1894, and he sold the other four. Therefore at the time when the settlement was executed he had only an equitable interest in four plots.

Thomas Boucher Irwin died in 1895. William Charles Irwin the elder died on September 8, 1903, leaving by his will to his daughter Christine Irwin the ground-rent on the houses built on the four plots in Quick's Road which were included in the settlement. Ellen Irwin died on September 20, 1903, leaving nine children.

The question arose whether the settlor's equitable interests in the nine houses and the four plots of land had passed under the settlement to the trustees for an estate in fee simple, the assignment to them containing no words of limitation, or only for an estate for the joint lives of the trustees and the life of the survivor.

Miss Christine Irwin took out a summons for the determination of this and other points.

J. M. Stone, for the plaintiff. The trustees only took an estate for their joint lives and the life of the survivor of them.

BUCKLEY J. 1904 IRWIN, *In re.* IRWIN *v.* PARKES.

It is now settled that words of limitation are as necessary for the purpose of passing the fee simple in equitable estates as in the case of legal estates. Formerly it was not so. Equitable estates passed according to the intention of the grantor without express words: Brooke's Abridgment, ed. 1573, "Contract," p. 174, pl. 1; "Estates," p. 294 b, pl. 1; "Conscience," p. 168, pl. 25; Co. Litt. 290 b, par. 16; Gilbert on Uses and Trusts, 3rd ed. p. 440, par. 238; Hayes's Introduction to Conveyancing, 5th ed. vol. i. pp. 91, 92. All these authorities refer to conveyances for value, except that in Co. Litt. it is said that there may be a declaration of trust without the word "heirs." In the present case the Court is dealing with a voluntary settlement. Even the old law never went beyond conveyances for value and declarations of trust. The old rule has now been changed and equitable limitations have the same construction as legal limitations: Elphinstone on Interpretation of Deeds, p. 276; Lewin on Trusts, 10th ed. pp. 117, 118, approved by Chitty J. in *In re Whiston's Settlement*. (1) The modern rule applies to declarations of trust where the legal estate is in the trustees: *Holliday* v. *Overton* (2), *Lucas* v. *Brandreth* (*No.* 2) (3), and *Tatham* v. *Vernon*. (4) We submit that it also applies in a case like this, where the question turns upon the conveyance to the trustees, not upon the trusts subsequently declared. The same considerations would apply if they had not been trustees. The manner in which they were afterwards to deal with the property is immaterial. By the modern rule the word "heirs" is necessary to pass the fee simple of these equitable estates.

In declarations of trust it has sometimes been held that words of limitation were unnecessary where the trusts are declared by reference to other trusts which give an absolute interest: *Pugh* v. *Drew*. (5) In *In re Tringham's Trusts* (6) Joyce J. held, on the ground that such was the intention of the settlor, that the equitable fee simple passed although there

(1) [1894] 1 Ch. 661.
(2) (1852) 15 Beav. 480.
(3) (1860) 28 Beav. 274.
(4) (1861) 29 Beav. 604.
(5) (1869) 17 W. R. 988.
(6) *The Times*, July 11, 1904; since reported, ante, p. 487; [1904] W. N. 153.

were no words of limitation. In that case the legal estate was in the trustees, so the decision does not apply to this settlement. The only cases like the present case are *Dearberg* v. *Letchford* (1), in which Wright J. applied the modern rule to an ordinary conveyance for value, and *In re Hudson* (2), in which North J. held that effect could not be given to the intention of the settlor, and that in the absence of words of limitation the grantee only took a life estate. It is clear that in the present case the properties mentioned in the schedule to which the settlor was legally entitled did not pass to the trustees in fee; so, if the other side are right, the trustees take part of the realty for life and part in fee. That cannot have been intended.

C. H. Tylee, for the heir-at-law of the settlor, adopted the plaintiff's argument. He referred to Cruise's Digest, 4th ed. tit. "Use," ch. 2, s. 32, vol. i. p. 343, *Garde* v. *Garde* (3), and *Middleton* v. *Barker*. (4)

F. Whinney, for Mrs. Hitchcock, another daughter. We take no interest under the settlor's will in his real estate; so we contend that all his real estate passed under the settlement. Words of limitation are not necessary in all cases even to pass legal estates. If there is nothing more than a gift to a person without words of limitation, that is not sufficient; but here there is a clear indication of an intention that the trustees are to take more than a life estate. The settlor recites that he is entitled to the freeholds for an estate in fee simple and desires to settle "the said freeholds," and he then assigns the said freehold property. That means the fee simple. He directs a sale and settles the proceeds of sale. The trust for sale includes the fee simple. He has made a good equitable settlement of the whole estate, and that includes the fee simple. The form of the ultimate gifts in the settlement and the power to appoint new trustees shew that that was his intention. The word "premises" in that power is wide enough to include the equitable fee. The language would not be satisfied by less than the fee. The definition clause at the beginning of the deed contains words of limitation although it omits the word "heirs," and

(1) (1895) 72 L. T. 489.
(2) (1895) 72 L. T. 892.
(3) (1843) 3 D. & War. 435.
(4) [1873] W. N. 231.

BUCKLEY J.
1904
IRWIN, *In re.*
IRWIN v. PARKES.

that again is another indication. So the intention that the fee should pass is evident on the face of the document.

It is not necessary that there should be referential words in order to pass the fee. The statement in *In re Hudson* (1) that the "settlor's intention" is not sufficient means his "intention" in the popular sense, not his "intention" as appearing on the face of the document. In the cases in Beavan's Reports the settlor had used words of limitation in the gift to trustees, and thus shewn that he knew how to limit an estate properly. *In re Whiston's Settlement* (2) shews that a clear indication of intention is sufficient, and that the recitals can be looked at for that purpose.

R. J. Parker, for Nella Stowell and Clara Shubrook, two other daughters of the settlor, supported the same contention. An equitable estate is really a personal right against some person, and that will pass without conveyance: Hayes's Introduction to Conveyancing, 5th ed. vol. i. p. 96. For instance, in a contract for sale words of limitation are unnecessary, and the absence of technical words does not matter.

A. F. Peterson, for the surviving trustee. The equitable fee simple passed to us. The words "executors and administrators" in the definition of trustees are of course insufficient, but they shew the intention. The direction to sell the freeholds operates as a common law power, and the trustees can under that sell the equitable fee simple.

BUCKLEY J. If there is to be any relaxation of the rule as to the necessity of the use of words of limitation for passing real estate, I think that relaxation must be made by the Court of Appeal, and not by myself. I am bound by authority to decide this case in a way in which, if the matter were res integra, I do not hesitate to say that I should not decide. William Charles Irwin was entitled to certain land for an equitable estate, and to other land for a legal estate. I have now to deal with that to which he was entitled for an equitable estate in fee simple. On November 25, 1884, he made a certain disposition of it. Before detailing the contents of that deed I will refer,

(1) 72 L. T. 892. (2) [1894] 1 Ch. 661.

quite shortly, to the authorities which have been cited and shew which of them have, in my opinion, no express bearing, although they have some indirect bearing, on the point I have to decide. In order of date the authorities are these: *Holliday* v. *Overton* (1), where by a marriage settlement, for value therefore, real estate was conveyed by the wife to a trustee and his heirs upon trust for her separate use for life, with remainder in trust for her children as tenants in common, omitting the limitation to their heirs. It was held that they took life estates only. The conveyance was sufficient to pass the fee simple to the trustee, and it was by reason of the omission of words of limitation in the definition of the beneficial interests that the beneficiaries took only an estate for life. When I come to the present deed, it will be found that *Holliday* v. *Overton* (1) is not expressly in point, because in the case I have to deal with there are no words of limitation in the gift to the trustees. I do not think I need say anything further about that case except that at p. 485 there are some words on the question whether the recitals in the deed would have been sufficient to enable the Court to hold that the beneficiaries took an estate in fee. The Master of the Rolls decided nothing about how far the limitations could be controlled by the recitals, because, he says, even if the recitals were admissible they would not advance the argument.

The next case is *Lucas* v. *Brandreth* (*No.* 2). (2) That is, I think, in all essential particulars a repetition of *Holliday* v. *Overton* (1), a gift under a marriage settlement to trustees and their heirs for beneficiaries, with no words of limitation in the gift of the estate of the beneficiaries.

The next case is *Tatham* v. *Vernon* (3), and is the same as the previous two except that there is a gift over after that to the children on which the question arises. The gift over is given at p. 608 as follows: "if there should be no such child, or the issue of any such child, at the decease or second marriage of his wife, then the trust estate, moneys and premises to go to and be conveyed to the heirs or next of kin of John Miller

(1) 15 Beav. 480. (2) 28 Beav. 274.
(3) 29 Beav. 604.

BUCKLEY J. 1904 IRWIN, *In re.* IRWIN *v.* PARKES.

Vernon." I do not find that the gift over was dwelt upon at all by the Master of the Rolls in his decision, except that he says (1): "The consequence of this will be, that so far as regards the freeholds, the reversion passed to the settlor's right heirs, under the ultimate limitation contained in the settlement."

The next is a decision of Chitty J., who was perhaps as great a master of this branch of the law as any judge of recent times. That is *In re Whiston's Settlement.* (2) There the settlor was entitled to an equity of redemption. He recited that he was desirous of settling all his freehold and personal estate for the benefit of his wife, himself, and their children, and he assured the equity of redemption in certain freeholds to trustees and their heirs upon trust for the settlor's wife for life, with remainder to the settlor for life, and after his death "then as to and concerning the hereditaments and the rents and profits thereof" upon trust for his children without any words of limitation. Chitty J. says this: "If the case had to be decided according to the doctrine of legal limitations, it is plain that these children would only take life interests; but the limitations are, as a fact, only of an equitable interest, and on this point some of the older text-writers, such as Cruise and Hayes, seem to have been of opinion that equity regarded the intention of the settlor in these cases, and did not follow the law; so that the Court had some considerable latitude in the construction of equitable limitations like the present; but the more modern text-writers seem to have rather come round in their opinions, and in Elphinstone on the Interpretation of Deeds it is stated—'an equitable limitation by way of trust executed has the same construction as a legal limitation.' In Lewin on Trusts it is laid down that if an estate be conveyed by deed to the use of a trustee and his heirs, in trust for the settlor for life, and after his death upon trust for his children simply, without the word 'heirs' the children by analogy to legal limitations take an estate for life only." Then he refers to the cases I have mentioned: *Holliday* v. *Overton* (3), *Lucas* v.

(1) 29 Beav. 615. (2) [1894] 1 Ch. 661, 663.
(3) 15 Beav. 480.

Brandreth (*No.* 2) (1), and *Tatham* v. *Vernon* (2), together with the latest decision on the subject, the Irish case of *Meyler* v. *Meyler* (3), "a decision of Chatterton V.-C., where he considered himself bound by those three cases in Beavan, and came to a conclusion in accordance with the rule as laid down in Elphinstone on Interpretation of Deeds." Then just below he says: "I think the reasoning of the Irish Vice-Chancellor is correct, and that he came to a right conclusion." That is an express affirmation by Chitty J. of the views expressed in Elphinstone on the Interpretation of Deeds and in Lewin on Trusts. Then he says something also about the recital: "Some reliance was placed, in the course of the argument, on the recital that the settlor was desirous of settling all his freehold and personal estate for the benefit of his children, and it was said, that this would distinguish the case from the authorities in Beavan. In my opinion, that recital is not sufficient to carry the fee to the children; besides, the settlor, after having so far benefited them by giving them a life interest, might have intended the reversion in fee to result to himself." That is a passage which I think will become material when I come to read the provisions of the deed before me.

Those four cases have no express application to the case I have to decide, because in all of them there were words of limitation in the gift to the trustees. But those four cases are relevant to this extent—that Chitty J. said the modern rule, and not the rule of the older text-writers, is now the rule that ought to be applied. This Court is not at liberty to regard the intention of the settlor in these cases instead of following the law.

The next two cases are, first, a decision of Wright J. in *Dearberg* v. *Letchford* (4), which was this: Robert Henry Letchford for value, namely, in consideration of the release by his father, Robert Michael Letchford, of the sum of 1000*l.*, being a portion of his debt to him of a much larger amount, assigned to Robert Michael Letchford absolutely all his estate and interest whatsoever of and in the property, estate, and

(1) 28 Beav. 274.
(2) 29 Beav. 604.
(3) (1883) 11 L. R. Ir. 522.
(4) 72 L. T. 489, 490.

BUCKLEY J.
1904
IRWIN, *In re.* IRWIN *v.* PARKES.

effects devised and bequeathed by the will of the late Thomas Dolley. No words of limitation were inserted. Did that pass a fee simple equitable estate in Robert Henry Letchford's interest in Dolley's real estate? Wright J. decided that it did not, and he begins by saying this, which I adopt: "It seems to me of great importance not to introduce any uncertainty into the construction of conveyances and instruments of that kind; and that, if any doctrine is established, no exception should be allowed from it without the greatest reluctance." Then he went on to decide the case on the footing of *In re Whiston's Settlement* (1), to which I have referred.

The next is a decision of North J., in *In re Hudson.* (2) It is said that this case is a binding authority as regards the conclusion which I must come to in the case before me, and I think it is. It is a decision of a judge of co-ordinate jurisdiction with myself, and I think that I ought to follow it. If there be anything wrong in it, it is for the Court of Appeal, and not for myself, to determine the contrary. The facts were that Edward Hudson by his will made certain dispositions in favour of Edward Harrison Hudson, and by a deed of post-nuptial settlement, a voluntary deed therefore, dated November 4, 1891, Edward Harrison Hudson, after reciting that under the will of Edward Hudson he was then absolutely entitled in possession to a share in the testator's residuary estate and the investments representing the same, and that he was desirous of making such disposition and settlement of the said share as was therein contained, assigned to two persons all that the share and interest to which he was entitled under the will in the residuary estate of the testator to hold to those two persons, their executors, administrators, and assigns. There were no words of limitation. What was the result? Did the assignees take an equitable estate in fee simple in the property to which he (Edward Harrison Hudson) was entitled under Edward Hudson's will? North J. says No, he did not. I think the learned judge had no doubt, and I may say I have no doubt in the case before me, that if the settlor had been asked what he meant, he would have said that he meant to pass the

(1) [1894] 1 Ch. 661. (2) 72 L. T. 892, 894.

fee; but on the face of the deed he has not done it. North J. begins by saying: "I think there has been an unfortunate miscarriage in this case, and though I have no doubt that the settlor intended his whole interest to pass, I think that intention cannot have effect." Then, after discussing the provisions of the deed, he goes on to say this, and this is the dominant sentence in the judgment: "If there were any words which shewed that the trustees were to take all the share and interest which the testator had in the same way as the testator had it, that might be sufficient; but I can find no such words." Then he goes on to say that although he purports to dispose of all his share and interest under Edward Hudson's will, those were merely words of description; there was nothing to shew for what interest it was conveyed. There was nothing to indicate the estate the trustees were to take. Inasmuch as he used no words of limitation, and no words which, although not technically words of limitation, might have tended to express that he intended to pass all his share and interest under the will, so that the grantee should have all that which he, the grantor, had, the result was that he had not passed the absolute interest.

There is only one other decision to which I need refer, and that is a decision of James V.-C. in the case of *Pugh* v. *Drew*. (1) That is a case in which leaseholds were disposed of by words sufficient to pass an absolute interest in leaseholds to A. and B., their executors, administrators, and assigns. Then freeholds were conveyed to A. and B., their heirs and assigns, upon trusts declared by these words: "Upon such and the same trusts, and for such and the same ends, intents, and purposes, and subject to such and the same powers, provisoes, and declarations as in the said indenture of the 7th day of March, 1818, are expressed, declared, and contained of and concerning the premises therein mentioned and described, or as near thereto as the difference of the respective estates of the said" trustees "and their respective heirs, executors, and administrators therein respectively would admit." In other words,

(1) 17 W. R. 988, 989.

BUCKLEY J.

1904

IRWIN, *In re.* IRWIN *v.* PARKES.

freeholds were disposed of referentially to a disposition of leaseholds which passed the absolute interest in the leaseholds. What was the effect as regards the freeholds? The Vice-Chancellor says this in an interlocutory observation: "Is there any authority for the position that if there be a deed settling leaseholds in trust for A. B., his executors, administrators, and assigns, and freeholds upon the same trusts, or as near thereto as the circumstances of the case will admit, this is to be construed as giving A. B. an estate for life only in the freeholds?" By his judgment he negatives that, and says that words of reference would do perfectly well. If a gift of freeholds without words of limitation refers to a gift under which an absolute interest in leaseholds is passed, and directs that the freeholds shall be held on similar trusts, the fee simple will pass. James V.-C. says: "Some cases were cited to the effect that a conveyance to A. and his heirs in trust for B. only gives B. a life estate. But Mr. Simpson was obliged to go further, and to maintain that the want of words of inheritance is absolutely fatal under all circumstances. There is no doctrine of this Court which compels me to maintain such nonsense." The result of these decisions, as it appears to me, is this. An equitable estate in fee simple will pass without words of limitation if the assurance is so made referentially as to shew that the equitable estate in fee simple is to pass for an absolute interest and estate, as when it is said that it is to be held upon the same trusts as leaseholds which have been assigned to A. B., his executors, administrators, and assigns, or as near as the rules of law and equity will permit. An equitable estate in fee simple will also pass without words of limitation if you find words that express that the grantee is to have all the estate and interest which the grantor had. It may further pass without words of limitation if the grantee has independently of the deed itself an equitable right to the fee simple, as, e.g., where he has paid the purchase-money for the property. Except in those three cases, I am not aware of any decision that an equitable estate in fee simple will pass without words of limitation.

Now, turning to the deed, the relevant provisions are these. [His Lordship read the settlement down to and including the trust for sale, and continued:—]

I do not seek to attribute any importance to the verb "assign." The deed does not say "grant" or "convey" or "assure," which would be proper verbs to use, no doubt, but says "assign." If it had said "assign to trustees and their heirs," I have no doubt the verb would be sufficient to pass the fee simple; but there are no words of limitation to the trustees. There is nothing so far to assist the matter except that the settlor recites that he is absolutely possessed of and entitled to the freeholds, and that he is desirous to settle them in manner hereinafter provided. What it does, therefore, is to create some estate or other in that to which he is equitably entitled in fee, and he does it in language which, by reason of the absence of words of limitation, creates only a life interest in the trustees. Then he goes on with the trust for conversion, and subsequently declares beneficial trusts. I cannot doubt, looking at the provisions of the deed, that he thought he had sufficiently passed to his trustees the fee simple; but if he has not passed the fee, I cannot pass it for him. There are no words of limitation in favour of the trustees. That brings the case within the doctrine of the authorities mentioned in *In re Hudson* (1) and *Dearberg* v. *Letchford.* (2)

Then are there any referential words by which he says "I give my freeholds upon the same trusts" as anything else which he has given absolutely? Are there any words by which he says "I give my whole interest in the estate"? No, there are not. He says, "I have an absolute interest, and I am going to settle it in manner hereinafter provided." Then he simply assigns that in which he had the equitable fee simple to trustees without words of limitation, and creates thereby only an estate for life. I ought to mention a very recent decision of Joyce J.: *In re Tringham's Trusts.* (3) I may say that this case stood over in order that I might have the

(1) 72 L. T. 892.
(2) 72 L. T. 489.
(3) *The Times*, July 11, 1904; since reported, ante, p. 487; [1904] W. N. 153.

BUCKLEY J. 1904 IRWIN, *In re.* IRWIN *v.* PARKES.

benefit of that learned judge's decision before I decided this case. In that case there was a limitation to the trustees in fee. There were words of limitation in the gift to the trustees. Joyce J. was proceeding upon the footing that the limitation to the trustees was in fee; therefore that case is not in point upon that which I have to decide. I must hold that these equitable freeholds passed only for an estate for the lives of the trustees and the survivor of them. I come to this conclusion with regret. I find by reason of the absence of words of limitation that there passed to the trustees merely an estate for the lives of the trustees and the life of the survivor—that is, for the lives of Thomas Boucher Irwin and William Charles Parkes, the trustees named in the deed, and the survivor of them.

Solicitors: *Stones, Morris & Stone; Watson, Sons & Room.*

H. C. R.

BUCKLEY J.
1904
Aug. 3.

In re BLUNT'S TRUSTS. WIGAN *v.* CLINCH.

[1903 B. 2437.]

Will—Construction—Charitable Legacy—School—Endowment—Trust Deed—Forfeiture—Gift over to Residue—Perpetuities—Education Act, 1902 (2 *Edw.* 7, *c.* 42), *ss.* 11, 13.

By her will made in 1891 Mrs. Blunt gave to trustees such a sum as would produce 20*l.* a year, and directed them to pay that income to the treasurer for the time being of the Bicknor National Schools for the support of the schools so long as they should be carried on under the conditions contained in the trust deed of the schools, and the funds necessary for carrying them on should be supplied by voluntary contributions. The testatrix declared that this gift should be void if any of the three following events should happen in her lifetime, namely: (1.) if a school board for the parish should be formed; (2.) if the funds necessary for carrying on the schools should be raised under powers contained in any Act of Parliament; (3.) if a trust should be created and a sufficient fund set apart for carrying on the schools under the deed of trust. She further declared that if either of the two first-mentioned events should happen after her death, then that the payment of the annuity was to cease and the fund purchased to produce the same was to fall into her residuary estate.

The testatrix died in 1900. None of the events mentioned happened in her lifetime. On January 8, 1904, the Board of Education issued a final order under s. 11 of the Education Act, 1902, for the appointment of foundation managers of the school. The result was that the school could no longer be carried on under the provisions of the trust deed:—

Held, that the school was no longer carried on under the conditions contained in the trust deed, and, therefore, that the annuity had come to an end; the second condition had been satisfied, so the annuity had ceased under that also; the annuity fund, therefore, fell into the residue by operation of law, and it was unnecessary to consider whether the gift over to the residue was void as an infringement of the rule against perpetuities.

By her will dated August 10, 1891, Mrs. Blunt bequeathed to trustees "such a sum as when invested in the purchase in the names or name of my trustees or trustee of 2*l.* 15*s.* per cent. consolidated stock" or other securities "will produce a clear income or yearly sum of 20*l.* And I direct my trustees or trustee to pay such income or yearly sum to the treasurer

BUCKLEY J. 1904 BLUNT'S TRUSTS, *In re.* WIGAN *v.* CLINCH.

for the time being of the Bicknor and Hucking National Schools for the support of the said schools so long as they shall be carried on under the conditions contained in the deed of trust of the said schools dated 18th June, 1873, and the funds necessary for so carrying them on shall be supplied by voluntary contributions. But I declare that this bequest shall not take effect but shall be null and void if any of the three following events shall happen in my lifetime, videlicet: (1.) if a school board for the parishes of Bicknor and Hucking shall be formed, or (2.) if the funds necessary for carrying on the said schools shall be raised under powers for that purpose contained in any present or future Act or Acts of Parliament, or (3.) if a trust shall be created and a sufficient fund shall be set apart for the purpose of carrying on the said schools under the conditions of the aforesaid deed of trust. And I further declare that if either of the two first-mentioned events shall happen after my death, then immediately on the happening of such one of these events as shall first happen the payment of the said income or yearly sum to the treasurer aforesaid under the aforesaid direction in that behalf shall cease and determine, and the fund purchased to produce the same shall fall into and form part of my residuary estate." The testatrix devised and bequeathed all the residue of her real and personal estate to her nephew E. E. Green absolutely.

Mrs. Blunt died on April 3, 1900. None of the events mentioned happened in her lifetime.

In order to meet the annuity of 20*l.* a sum of 695*l.* 13*s.* 6*d.* was invested in the purchase of 800*l.* Midland Railway 2½ per cent. debenture stock, and the dividends had since been paid to the treasurer of the schools.

The trust deed of June 18, 1873, under which the schools had been carried on, was in one of the forms in use by the National Society for promoting the education of the poor in the principles of the Established Church throughout England and Wales. By the deed it was declared that the school was always to be in union with and conducted according to the principles of the National Society, and should be controlled in manner following: That the principal officiating minister for

the time being of the said parish of Bicknor should have the superintendence of the religious and moral instruction of all the scholars attending the school; that in other respects the control and management of the school and premises and the funds and endowments thereof and the appointment and dismissal of the schoolmaster and schoolmistress should be vested in a committee consisting of the principal officiating minister for the time being of the said parish, his licensed curate or curates if the minister should appoint him or them to be members, such of the churchwardens for the time being of the parish and of the ancient chapelry of Hucking as should be communicants of the Church of England, and six other persons (of whom two were named) being contributors to the funds of at least 20*s.* a year and being communicants of the Church of England, and either having a beneficial interest to the extent of a life estate at least in real property situated in the parish of Bicknor, or be resident therein or in a parish or ecclesiastical district adjoining thereto; vacancies on the committee were to be filled up by election by the contributors to the school funds being members of the Church of England. The master and mistress of the school were to be members of the Church of England. All the provisions of the Elementary Education Act, 1870, which constituted a public elementary school were to apply to this school. Differences were to be referred to the bishop, and in some cases to the Lord President of the Privy Council.

On January 8, 1904, the Board of Education issued a final order under s. 11 of the Education Act, 1902, for the appointment of foundation managers of the school. The order contained rules to come into force after that date for the appointment of foundation managers, a definition of qualified persons and qualified subscribers, and other provisions which differed from the conditions of the trust deed.

The trustee of the will took out an originating summons for the determination of the question whether, upon the coming into operation of Part III. of the Education Act, 1902, with reference to the Bicknor and Hucking National Schools, the Midland Railway debenture stock would fall into and form

BUCKLEY J.
1904
BLUNT'S TRUSTS, *In re.*
WIGAN *v.* CLINCH.

part of the residuary estate of the testatrix, and how the capital and income thereof ought to be applied and dealt with.

The defendants were the residuary legatee and the managers of the school. The Kent County Council had received notice of the summons, and had replied that they considered themselves sufficiently represented by counsel for the managers.

Rashleigh, for the trustee of the will.

O. L. Clare, for the new managers. The annuity has not come to an end and the gift over has not taken effect. At the date of the will the school was supported by voluntary subscriptions and by the Government grant, so the words "so long as . . . . the funds for so carrying them on shall be supplied by voluntary contributions" must mean "so long as voluntary contributions are necessary for that purpose." They are still necessary. The trust deed is still in force under s. 7, sub-s. 6, of the Education Act, 1902, although by s. 6, sub-s. 2, the old managers are displaced, and by s. 11 the appointment of new managers is provided for, and they have been appointed by the order of the Board of Education. Therefore the annuity has not come to an end under that clause. It is still required for the repairs of the building.

None of the events in which the annuity was to cease happened in Mrs. Blunt's lifetime. The only one of the events which is alleged to have happened since her death is the second —the raising of funds under the Education Act, 1902. As a matter of construction we submit that the fact that the school now receives money from the rates does not fulfil the second condition. At the date of her death the school was in receipt of the Government grant, so there has really been no change. It was a "public elementary school not provided by the local education authority" within s. 6, sub-s. 2, of the Act of 1902. Only the expenses of education fall on the rates. Other expenses have still to be provided for: s. 7, sub-s. 1. Sect. 13 expressly says that "nothing in this Act shall affect any endowment, or the discretion of any trustees in respect thereof." Therefore the second event has not happened. The testatrix was contemplating the event of the school ceasing to be a

voluntary school. She was not considering the amount of the contribution from public funds.

[BUCKLEY J. Formerly a voluntary school need not take anything from the public funds; now it is obliged to do so.]

The school might have earned money by examinations. She did not mean to withdraw the gift because the school obtained a larger grant.

Assuming that the second condition has been fulfilled, we submit that that makes no difference, because the gift over is bad. It need not take effect within the prescribed period of a life or lives in being and twenty-one years afterwards; therefore it offends against the rule against perpetuities and is void: *In re Bowen* (1); *In re Beard's Trusts.* (2) It is true that in *In re Randell* (3) North J. held that a gift over to residue was mere surplusage and not within the rule against perpetuities; but here the gift to the charity is for all time, and it is necessary to rely on the gift over.

F. G. Champernowne, for the residuary legatee, was not called upon to argue.

BUCKLEY J. I think the very event has happened on which the testatrix has said that the gift of the annuity is to cease and determine. She gave a certain sum of money to trustees upon trust "to pay such income or yearly sum to the treasurer for the time being of the Bicknor and Hucking National Schools for the support of the said schools so long as they shall be carried on under the conditions contained in the deed of trust of the said schools dated 18th June, 1873, and the funds necessary for so carrying them on shall be supplied by voluntary contributions." The deed of 1873 contained provisions that the school and endowments should be controlled and managed by the principal officiating minister for the time being of the parish of Bicknor; that there should be a committee consisting of the principal officiating minister for the time being of the said parish, his licensed curate or curates if appointed by the minister, such of the churchwardens for the

(1) [1893] 2 Ch. 491. (2) [1904] 1 Ch. 270.
(3) (1888) 38 Ch. D. 213.

BUCKLEY J. 1904 BLUNT'S TRUSTS, *In re.* WIGAN *v.* CLINCH.

time being of the said parish of Bicknor and of the ancient chapelry of Hucking as should be communicants of the Church of England, and six other persons, who were to contribute 20*s.* a year at least to the funds of the school and were to be communicants of the Church of England and have a beneficial interest in real estate in the parish of Bicknor, or be resident therein. The deed contained a number of other provisions constituting qualifications of persons who should have control of the school. The result of the Education Act, 1902, is that that body is displaced. Are the schools carried on under the conditions contained in the trust deed? It is plain that they are not. Under the clause of the will which I have read the annuity has come to an end.

Then the testatrix went on to declare that the bequest should be null and void if any of three events should happen in her lifetime: (1.) if a school board for the parishes of Bicknor and Hucking should be formed; (2.) if the funds necessary for carrying on the schools should be raised under powers contained in any Act of Parliament; or (3.) if sufficient funds should be set apart to carry on the schools under the conditions of the trust deed; and she declared that if either of the two first-mentioned events should happen after her death, then the payment of the annuity was to cease and determine and the fund purchased to produce the same was to fall into and form part of her residuary estate. It was said on the authority of *In re Bowen* (1) that such a gift over was void because it came within the rule against perpetuities; that you cannot have a gift over which does not take effect within the prescribed period of a life or lives in being and twenty-one years afterwards. That principle is quite firmly established, but it does not apply to this case. There is no necessity to resort to the gift over. The gift over is a direction that the fund shall fall into her residuary estate. That is where it would go by law if the gift failed. Therefore I have only to look at the will to ascertain whether the event has happened on which the annuity was to cease and determine. Has the event happened on which it was to cease? If so, the

(1) [1893] 2 Ch. 491.

fund by law goes into the residue, and there is no necessity to resort to the gift over. As North J. said *In re Randell* (1): "If she had said that it would fall into and form part of her residuary personal estate, she would simply have been saying what the law is; and saying that it shall do so is simply saying what the law would do without such a statement. In my opinion a direction that in a particular event a fund shall go in the way in which the law would make it go in the absence of such a direction, cannot be said to be an invalid gift or contrary to the policy of the law." It results from this that I am also entitled to read the conditions contained in the defeasance clauses of the will and see whether they have taken effect. One of them is that the bequest of the annuity shall be null and void if the funds necessary to carry on the school shall be raised under any Act of Parliament. That is satisfied, for to a certain extent the funds are now provided under the Education Act, 1902. I am therefore of opinion that the gift of the annuity has ceased to take effect, and that the fund has fallen into the residue.

Solicitors: *Wigan, Champernowne & Prescott.*

(1) 38 Ch. D. 218.

H. C. R.

JOYCE J.
1904
July 5, 6, 9.

In re RIDLEY.
RIDLEY *v.* RIDLEY.

[1903 R. 1268.]

Executor—Retainer—Insolvent Estate—Executor of Sole Trustee—Disclaimer of Trust—Exercise of Right of Retainer for Benefit of Trust Estate.

The sole trustee of a fund misappropriated it and died insolvent. His executor had never acted in the trust, and desired to be discharged therefrom:—

Held, that he was entitled to decline to act in the trust, and was not bound to exercise his right of retainer for the benefit of the cestuis que trust in respect of the debt due to him as trustee of the fund.

By his will dated January 15, 1886, Frederick Ridley, senior, bequeathed to his son, Frederick Ridley, junior, a legacy of 3000*l.* upon trust to invest the same, and to stand possessed of the investments upon trust during the joint lives of his son Morris Samuel Ridley, and of any wife he might have, and during the life of the survivor to apply the income for the maintenance and support or otherwise for the benefit of M. S. Ridley and his wife or widow and issue as he (F. Ridley, junior) should think fit, and, after the decease of the survivor of the husband and wife, upon trust for the children who should attain twenty-one or marry under that age.

F. Ridley, senior, died on October 6, 1887, and in April, 1888, the 3000*l.* was paid to F. Ridley, junior. The money was invested by him in Consols, and until 1894 the income was paid half-yearly by him in accordance with the terms of the trust.

In August, 1894, F. Ridley, junior, sold out the Consols and misappropriated the proceeds, but he continued during the remainder of his life to pay half-yearly to the persons entitled to the legacy a sum approximately equivalent to the interest upon the Consols.

F. Ridley, junior, died on March 5, 1903, and his will was proved by Henry Ridley, the sole acting executor thereof, the other executor having renounced probate. F. Ridley, junior's,

estate proved to be insolvent, and it was being partially administered by the Court in an action brought by the persons entitled to the legacy of 3000*l.* against Henry Ridley.

The plaintiffs then took out this summons, intituled "In the matter of the estate of Frederick Ridley, junior," and "In the matter of the trusts of the will of Frederick Ridley, senior," asking that the defendant, as executor of the will of F. Ridley, junior, might be directed to retain out of his testator's estate the amount due in respect of the legacy.

It was not proved that the defendant had ever acted in the trusts of the legacy, and, so far as he had any interest in the matter, he was unwilling to exercise his right of retainer; but he submitted to act as directed by the Court, and he desired to be discharged from the trust. The summons was opposed by the Capital and Counties Bank, who, as the next largest creditors (after the plaintiffs) of the deceased, had obtained liberty to attend the administration proceedings.

Hughes, K.C., and *Napier*, for the summons. The defendant Henry Ridley is bound to exercise his right to retain the balance due from his testator's estate on account of the trust legacy if the beneficiaries insist upon his doing so. It is his duty to exercise all his legal rights for the benefit of the trust estate: *Fox* v. *Garrett* (1); *Sander* v. *Heathfield* (2); *Crowder* v. *Stewart* (3); *In re Faithfull* (4); *In re Owen.* (5) The defendant, having proved the will, cannot disclaim the trust: *Brooke* v. *Haymes* (6); Lewin on Trusts, 10th ed. p. 209.

[JOYCE J. referred to Lewin on Trusts, 10th ed. p. 795, and *Legg* v. *Mackrell.* (7)]

At any rate he is bound to protect the trust estate until new trustees are appointed.

R. R. Reeve, for the defendant Henry Ridley.

L. Ryland, for the Capital and Counties Bank. The right of retainer is not viewed with favour in modern times since it produces inequality amongst creditors, and this Court will not

(1) (1860) 28 Beav. 16.
(2) (1874) L. R. 19 Eq. 21.
(3) (1880) 16 Ch. D. 368, 371.
(4) (1887) 57 L. T. 14.
(5) (1889) 23 L. R. Ir. 328.
(6) (1868) L. R. 6 Eq. 25.
(7) (1860) 2 D. F. & J. 551.

JOYCE J. 1904 RIDLEY. *In re.* RIDLEY *v.* RIDLEY.

assist these beneficiaries to compel the defendant to exercise his right in their favour and so oust the other creditors: *Trevor* v. *Hutchins* (1); *Davies* v. *Parry* (2); *In re Williams* (3); *In re Rhoades.* (4)

Hughes, K.C., in reply.

Cur. adv. vult.

July 9. JOYCE J. Nowadays the right of retainer, producing inequality amongst creditors, is certainly not favoured by the Court, and I should not order the right to be exercised unless I felt that I was required by principle or bound by authority to do so. In the present case the testator, F. Ridley, junior, whose estate is insolvent and is being administered, or partially administered, by the Court, was sole trustee under the will of F. Ridley, senior, of a legacy of 3000*l.* A great part of that legacy was recovered, but the rest could not be traced, and is a debt due from the testator's estate. As to that balance it is asked that the defendant, being the legal personal representative of the deceased trustee, should exercise the right of retainer, and pay the amount out of the testator's estate in priority to other claims. In passing, I may remark that the reason given for the origin of the right of retainer and the justification for it is that a creditor being an executor or administrator cannot sue himself. In this particular case, however, the action has been brought by the beneficiaries, and it is not a trustee suing himself. The position taken up by the defendant, the executor, is this. He says, "I desire not to exercise the right of retainer, and decline to exercise the right unless ordered to do so; but I am willing to submit to the order of the Court; and, further, I decline to act as trustee of the legacy." Primâ facie I am of opinion that he is entitled so to decline: *Legg* v. *Mackrell.* (5) I do not find in the facts of the case any real ground for the allegation that he has done or said anything which precludes him from so declining. He never agreed to be trustee of the legacy, nor has it been shewn by the evidence that he has ever acted as such. Indeed, I am

(1) [1896] 1 Ch. 844, 849, 852, 854.
(2) [1899] 1 Ch. 602, 605.
(3) [1904] 1 Ch. 52, 56.
(4) [1899] 2 Q. B. 347, 353.
(5) 2 D. F. & J. 551.

not sure that a person who never agreed to be trustee, and is only trustee by reason of the trust estate having devolved upon him by operation of law, may not at any time decline to act further in the trust. But, however this may be, I hold that the defendant has never acted and is entitled to decline; and, inasmuch as he so declines, I am unable to direct him to exercise any right of retainer even if I otherwise were bound to do so, which under the circumstances it is not necessary for me to decide.

Solicitors: *Field, Roscoe & Co., for Birkett, Ridley & Francis, Ipswich; Arthur Toovey, for Bankes Ashton & Holley, Bury St. Edmunds; Cameron, Kemm & Co.*

H. B. H.

In re RICHARDSON. RICHARDSON *v.* RICHARDSON.

[1904 R. 1209.]

Settled Land—Limited Owner—Person having Powers of Tenant for Life—Devise in Fee Simple with Executory Limitation over—Condition of residing and providing a Home for Third Party—Condition or Trust—Fetter on Power of Sale—Sale—Application of Proceeds—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 2, *sub-s.* 5; *s.* 51, *sub-s.* 1; *s.* 58, *sub-s.* 1 (*ii.*).

A testatrix gave her residuary estate, in the events which happened, (1.) to her niece C. on condition that she resided in the testatrix's house during the life of the testatrix's sister M., and provided there a home for M. so long as she wished; (2.) in the event of C. not complying with the condition, to another niece upon the like condition; (3.) in the event of neither niece complying with the condition, upon trust for M. for life with other trusts over on her death. At the date of the testatrix's death M. was a lunatic not so found, confined in an asylum, and was not expected to recover her faculties. Upon a summons by C. under the Settled Land Acts:—

Held, that C. was a person having the powers of a tenant for life under the Settled Land Act, 1882; that the condition as to providing a home was void so far as it prevented C. from exercising her power of sale; and that she was entitled to sell the house and keep the proceeds absolutely.

ALICE RICHARDSON by her will dated March 8, 1902, devised and bequeathed her residuary real and personal estate unto her niece Mabel Elizabeth Richardson, daughter of her brother

JOYCE J.
1904
RICHARDSON, *In re.* RICHARDSON *v.* RICHARDSON.

George Richardson, upon the condition that she resided in the testatrix's house, known as "Brooklyn," Henley-in-Arden, during the lifetime of the testatrix's sister Mary Ellen Richardson, and provided there a home free of cost or charge of any kind for her said sister whenever she should choose to avail herself of such home; and in the event of the testatrix's said niece predeceasing her or not complying with the said condition, the testatrix devised and bequeathed her residuary real and personal estate unto her niece Mary Catherine Richardson upon the like condition; and in the event of the said Mabel Elizabeth Richardson and the said Mary Catherine Richardson both predeceasing her or not complying with the said condition, the testatrix devised and bequeathed her residuary real and personal estate unto her niece Agnes Hope Richardson upon the like condition; and in the event of all three nieces predeceasing her or not complying with the said condition, the testatrix devised and bequeathed her residuary real and personal estate unto her trustees upon trust for her said sister Mary Ellen Richardson during her life, and after her decease upon trust to sell and divide the proceeds between the children of the testatrix's brother George Richardson.

The testatrix died on March 28, 1902. Mabel Elizabeth Richardson (then Mabel Elizabeth Green) disclaimed the conditional gift; but Mary Catherine Richardson accepted the gift, and came over from America to perform the condition.

At the date of the will Mary Ellen Richardson was a lunatic not so found by inquisition, and had been confined in an asylum since 1891. She was fifty-five years old, and was not likely to recover her faculties.

Mary Catherine Richardson took out an originating summons to determine—(1.) whether the plaintiff was a person having the powers of a tenant for life under the Settled Land Acts; (2.) whether she could sell the house "Brooklyn" discharged from the condition in the will as to residence and providing a home for the supposed lunatic; (3.) whether in the event of a sale she would be absolutely entitled to the proceeds discharged from any obligation to provide a home for the supposed lunatic.

The respondents to the summons were Mary Ellen Richardson and the person appointed to exercise the powers of a committee of her estate, and Agnes Hope Richardson.

Hughes, *K.C.*, and *Hugh Humphry*, for the applicant. The applicant is a tenant in fee simple in possession with an executory limitation over in a certain event; she is, therefore, a person having the powers of a tenant for life under the Settled Land Act, 1882: see s. 58, sub-s. 1 (ii.). That being so, the condition attached to the gift of the house of providing a home there for the lunatic is a provision which certainly tends to prevent the applicant from exercising the power of sale conferred on her by the Act, and is to that extent void under s. 51. This case falls within the authorities upon conditions as to residence: *In re Paget's Settled Estates* (1); *In re Smith*. (2) *In re Haynes* (3) is distinguishable. It follows that the applicant can sell the property discharged from the condition, and that she is absolutely entitled to the proceeds of sale discharged of the condition.

Younger, *K.C.*, and *Baden Fuller*, for the respondents. The cases cited do not apply to a condition which is imposed for the benefit of a third person. This provision, though in the form of a condition, is in substance a trust for the benefit of the lunatic, and the fact that it is called a condition does not alter its character: *In re Kirk* (4); *Wright* v. *Wilkin*. (5) The three nieces are really trustees for the lunatic, though with a certain beneficial interest. They are not tenants for life or persons having the powers of a tenant for life, because they are not "beneficially entitled to possession" within s. 2, sub-s. 5, of the Settled Land Act. The lunatic was the primary object of the testatrix's bounty. The dominant intention of the will was that the nieces should provide a home for the lunatic, and, failing that, that the lunatic should have the life estate.

(1) (1885) 30 Ch. D. 161.
(2) [1899] 1 Ch. 331.
(3) (1887) 37 Ch. D. 306.
(4) (1882) 21 Ch. D. 431, 437.
(5) (1862) 10 W. R. 403.

JOYCE J.
1904
RICHARDSON, *In re.* RICHARDSON *v.* RICHARDSON.

JOYCE J. In this case, in the events which have happened, there is a devise to the testatrix's niece, Mary Catherine Richardson, upon condition that she resides in the testatrix's house known as "Brooklyn" during the lifetime of the testatrix's sister Mary Ellen Richardson, and provides there a home free of cost or charge of any kind for her said sister whenever her said sister shall choose to avail herself of such home; and in the event of Mary Catherine Richardson not complying with the condition the property is devised to another niece. Now the sister Mary Ellen Richardson there named was unfortunately a lunatic, and at the date of the will had been confined as a lunatic for ten or a dozen years, and I am told that it is in the highest degree improbable that she will ever recover her mental faculties. In that state of things it appears to me that this provision with respect to residing at "Brooklyn" and providing a home for Mary Ellen Richardson if and whenever she should recover is in truth a condition, and not merely a trust or reservation for the benefit of this lunatic, as it might have been if the condition had been one for the payment of a sum of money, or for the payment of an annuity, or one permitting the lunatic to reside and occupy a portion of the property. Having regard to the cases with respect to conditions as to residence, it appears to me that the condition in this case does not materially differ from an ordinary condition as to residence, and is just as obnoxious to the 51st section of the Settled Land Act as if it had been for residence merely. Therefore I hold that Mary Catherine Richardson is a tenant in fee simple with an executory limitation over in a certain event, that is to say, that she comes within sub-s. 2 of s. 58 and has the powers of a tenant for life, and that s. 51 applies to this case. This condition is therefore void under that section, and Mary Catherine is entitled to sell the house and to keep the proceeds absolutely.

Solicitors: *Gribble, Oddie, Sinclair & Johnson, for Couchman, Christophers & Lodder, Henley-in-Arden.*

H. B. H.

SWINFEN EADY J.

1904

Oct. 27; Nov. 1.

In re CAYLEY.
AWDRY *v.* CAYLEY.

[1904 C. 2304.]

Revenue—Estate Duty—Settlement Estate Duty—Incidence—Express Provision—"The Death Duties payable out of my Estate"—Direction to pay out of Specific Fund—Finance Act, 1896 (59 & 60 *Vict. c.* 28), *s.* 19, *sub-s.* 1.

A testatrix directed "the death duties payable out of my estate" to be paid out of a specific fund:—

Held, that this was an "express provision" within s. 19, sub-s. 1, of the Finance Act, 1896, so that the settlement estate duty on chattels settled by the will was payable out of the specific fund.

In re Pimm, ante, p. 345, followed.

In re Lewis, [1900] 2 Ch. 176, distinguished.

ORIGINATING SUMMONS.

By her will dated July 3, 1899, a testatrix, after bequeathing certain pecuniary legacies "free of all death duties," and after making certain specific bequests, bequeathed certain chattels to the plaintiffs Edward Seymour Awdry, Peter Delmé Awdry, and James Worsley Pennyman upon certain trusts for certain persons for life, with remainders over.

The testatrix then bequeathed a specific fund to the plaintiffs Edward Seymour Awdry and Peter Delmé Awdry, the executors and trustees of her will, "upon trust to pay thereout my funeral and testamentary expenses and debts, and the legacies bequeathed by this my will, and the death duties payable out of my estate," and to stand possessed of the net residue of that specific fund upon trust as to two-thirds for the defendant May Delmé Awdry, and as to the remaining third on the trusts therein declared.

The testatrix gave and bequeathed the residue of her property to the defendant May Delmé Awdry.

The testatrix died on May 10, 1903.

This summons was issued to determine (inter alia) whether the settlement estate duty on the settled chattels was payable out of those chattels, or out of the specific fund.

SWINFEN EADY J.

1904

CAYLEY, *In re.* AWDRY *v.* CAYLEY.

T. A. Nash, for the plaintiffs.

Ward Coldridge, for the defendant May Delmé Awdry, representing the owners of the specific fund. A direction to pay "all duties payable by law out of my estate" out of a specific fund does not cover settlement estate duty: *In re Lewis*. (1) The words "by law" are clearly surplusage, and the present case is, therefore, undistinguishable.

Again, settlement estate duty is not a testamentary expense: *In re King* (2); *In re Clemow* (3); *In re Treasure* (4); *In re Maryon-Wilson*. (5)

The duty is, therefore, payable out of the settled chattels under s. 19, sub-s. 1, of the Finance Act, 1896, there being no express provision to the contrary.

Alfred Adams, for the life tenants of the settled chattels. Having regard to *In re King* (2), I cannot contend that settlement estate duty is a testamentary expense; but, whatever its incidence among the beneficiaries, it is one of "the death duties payable out of my estate." That, indeed, is the only fund available.

The expression "death duties" is used in s. 13 of the Finance Act, 1894 (57 & 58 Vict. c. 30), and is there defined to include estate duty, which by s. 5 includes settlement estate duty.

A direction to pay estate duty out of residue includes settlement estate duty: *In re Leveridge* (6); and a direction to pay "my debts, funeral and testamentary expenses and duties" out of residue includes settlement estate duty: *In re Pimm*. (7)

In *In re Lewis* (1) great stress was laid upon the words "by law," with the result that the expression "duties payable by law out of my estate" was construed "duties payable by law out of my residuary estate." The words "by law" do not occur in the present case, and there is nothing to suggest any reference to residuary estate. There is, therefore, an express provision to the contrary within s. 19, sub-s. 1, of the Finance

(1) [1900] 2 Ch. 176.
(2) [1904] 1 Ch. 363.
(3) [1900] 2 Ch. 182.
(4) [1900] 2 Ch. 648.
(5) [1900] 1 Ch. 565, 570.
(6) [1901] 2 Ch. 830.
(7) Ante, p. 345.

Act, 1896, and the settlement estate duty is payable out of the specific fund.

SWINFEN EADY J.

1904

CAYLEY, *In re.* AWDRY *v.* CAYLEY.

SWINFEN EADY J. The question is whether the settlement estate duty on the settled chattels is payable out of those chattels or out of the specific fund bequeathed "upon trust to pay thereout my funeral and testamentary expenses and debts, and the legacies bequeathed by this my will, and the death duties payable out of my estate." Does this trust amount to "an express provision to the contrary" within s. 19, sub-s. 1, of the Finance Act, 1896? Unless it does, the settled chattels must bear the duty under s. 19. On the other hand, if the trust amounts to "an express provision to the contrary," effect must be given to it under the section.

The language of the testatrix is very wide. She directs "the death duties payable out of my estate" to be paid out of the specific fund. It is clear that settlement estate duty is a death duty. In s. 13 of the Finance Act, 1894, where the expression "death duties" occurs, the expression is defined as including estate duty, and, therefore, settlement estate duty. A direction to pay "the death duties payable out of my estate" out of a specific fund would primâ facie include all death duties—i.e., settlement estate duty as well as estate duty. In *In re Lewis* (1) there was a direction to pay "all duties payable *by law* out of my estate" out of a specific fund. It was contended that the testatrix had contrasted duties of two classes, namely, duties payable by law out of her estate, i.e., duties payable by reason of death simpliciter, and duties payable by reason of something else, namely, the disposition she had made, such as legacy duties. Kekewich J. did not adopt this construction, but held that the "duties payable *by law* out of my estate" meant the duties thrown upon the residuary estate, and did not include settlement estate duty, which the law has said shall be payable out of the settled legacy. I am, however, not embarrassed by the expression "by law" in the present case.

In the recent case of *In re Pimm* (2) the testator, after

(1) [1900] 2 Ch. 176. (2) Ante, pp. 345, 347.

SWINFEN EADY J.

1904

CAYLEY, *In re.* AWDRY *v.* CAYLEY.

settling certain freeholds, directed "my debts, funeral and testamentary expenses and duties" to be paid out of residue. Farwell J. said: "The expression 'my duties' is certainly a wide phrase, and I can see no ground for restricting its generality. I think it is a compendious way of expressing what he had in his mind, and that he meant to say, 'all duties to which my estate is liable by reason of any of the dispositions I have made in my will.' I can see no other sensible construction of this direction in the residuary clause of the will. The duties are payable to the revenue, but they arise under the provisions of the testator's will, and in this sense are the testator's duties. . . . . The result is that in this case the settlement estate duty as well as the estate duty are payable out of the general residuary estate."

In the present case I am of opinion that the expression "the death duties payable out of my estate" extends to all death duties, namely, settlement estate duty as well as estate duty. It is a convenient and compendious expression, and I can see no reason to restrict its meaning. The duties must, therefore, be borne by the specific fund.

Solicitors: *Wood, Bigg & Nash, for W. J. & D. Awdry, Chippenham; Bell, Brodrick & Gray, for Gray & Dodsworth, York.*

G. R. A.

WARRINGTON J.
1904
June 29.

In re LINSLEY. CATTLEY *v.* WEST.

[1904 L. 96.]

Trustee—Breach of Trust—Negligence—Delay in accounting—Solicitor Trustee —Liability to indemnify Co-trustee—Costs of Action by Cestui que Trust.

A solicitor trustee, to whom the management of the trust has been left as the acting trustee, is liable to indemnify his co-trustee against the costs of an action caused by his negligent conduct of the trust business, even where no actual loss has been thereby occasioned to the trust estate.

Lockhart v. *Reilly*, (1856) 25 L. J. (Ch.) 697, applied.

ACTION.

The only question raised at the trial of this action which calls for any notice in this report was as to the liability of a solicitor trustee to indemnify his co-trustee against the costs incurred through the negligent management of the trust business, where no actual loss had been occasioned to the trust estate. The following summary of the facts will be sufficient to make the report intelligible.

In November, 1901, the plaintiffs became absolutely entitled under the will of one Sarah Linsley, by the death of a tenant for life, to one moiety of a trust estate in the possession or under the control of the trustees of the will: there were two trustees, one of whom, West, was a solicitor and the acting trustee, and the other, Hartley, was a retired doctor.

In April, 1902, application was made to West, as the acting trustee of the will, by the plaintiffs for information as to the trust estate, and for accounts; a long correspondence followed, in the course of which it appeared that part of the trust estate was invested in the names of both trustees upon certain equitable mortgages, but no proper accounts were furnished notwithstanding the repeated applications of the plaintiffs. Subsequently application was made by the plaintiffs to Hartley for accounts; Hartley thereupon by his solicitors pressed West to furnish him with the necessary information, telling him that he was being pressed for accounts by the plaintiffs. No

WARRINGTON J.
1904
LINSLEY, *In re.*
CATTLEY *v.* WEST.

satisfactory reply, however, was obtained from West, many of the letters remaining unacknowledged.

In January, 1904, as no satisfactory information or accounts could be obtained, the present action was commenced against West and Hartley, claiming a declaration that the equitable mortgages were breaches of trust; an account; and to have the loans called in and any deficiency made good by the defendants.

When the action came on for trial it appeared that all the investments had been called in or made good by West, and that, as a fact, no loss had been occasioned to the trust estate. Certain admissions were then made by the defendants, on which an order for an account from the death of the tenant for life was directed, and there remained only the costs of the action.

Rowden, K.C., and *Adams* for the plaintiffs, asked for an order against both defendants for the costs of the action down to judgment.

Norton, K.C., and *M. Romer*, for Hartley. The defendant Hartley did his best to obtain the information required from his co-trustee, and is not in any way to blame for this action; but if an order for costs is made against both trustees, then, as West was a solicitor and entrusted with the management of the trust estate, he is liable to indemnify his co-trustee against all losses, including the costs of this action as between solicitor and client. The principles applied in *Lockhart* v. *Reilly* (1), and recognised in *Bahin* v. *Hughes* (2) and *In re Turner* (3), are applicable here. The fact that no actual loss has been occasioned to the trust estate makes no difference in the liability of the solicitor trustee to indemnify his co-trustee where the action has been occasioned by his negligence and mismanagement of the trust estate.

E. A. Nepean, for West. No loss has been caused to the trust estate by West's conduct; he has not been guilty of any dishonesty. True, there has been some delay in rendering the accounts, but that is not sufficient to make him liable to indemnify his co-trustee. No authority can be cited in which

(1) 25 L. J. (Ch.) 697. (2) (1886) 31 Ch. D. 390. (3) [1897] 1 Ch. 536.

an honest trustee has been made liable to indemnify his co-trustee for costs occasioned by mere delay. The principles of *Lockhart* v. *Reilly* (1) are not applicable to a case of this kind.

WARRINGTON J., in the course of his judgment, said the defendants, though honest trustees, had acted unreasonably in the management of their trust, and in that sense had committed a breach of trust. The allegation in the plaintiffs' statement of claim that they had repeatedly applied to the defendants for proper accounts, which the defendants had neglected and refused to furnish, was proved beyond question, and the plaintiffs were, therefore, entitled to an order against both defendants for the costs of the action down to judgment; and Hartley could not be excused from liability in this respect simply because he had allowed his co-trustee to retain the information required by the plaintiffs. His Lordship then continued :—

Then comes this much more serious question: What am I to do with reference to these costs as between the two defendants? West is a solicitor; Hartley is not. The investments of the estate, with the exception of one mortgage, were all made by way of loan to clients of West. It is said that Hartley was informed when the investments were being made, and that he assented to them. I accept that: I do not think it affects the question, as I shall shew directly. But the active person in making the investments is West, and if he had kept reasonable records of what he had done there ought to have been no difficulty whatever, when he was asked for information as to the state of the estate, in furnishing the next day a statement of what had taken place, and how the estate was invested, and of what it consisted. For a whole year West is asked by the cestui que trust for the information to which I have alluded; then, when Hartley is being pressed by the cestui que trust, Hartley takes up the matter through his solicitors and presses West to furnish him with the necessary information, telling him at the same time that he is being pressed by the cestui que trust; and West does not make any

(1) 25 L. J. (Ch.) 697.

WARRINGTON J.
1904
LINSLEY, *In re.*
CATTLEY *v.* WEST.

satisfactory reply, and the result is that this action is brought. Now I acquit West altogether of dishonesty; nothing of the sort is charged against him, and there is not a trace of it; but I do think that he has acted in a most unreasonable and unbusinesslike manner. Can there be any doubt, if West had been a solicitor acting in this way towards a client, but that he plainly would have been liable to an action for negligence in case the client had suffered damage from such conduct?

Now it is recognised in several cases, and especially in *In re Turner* (1), by Byrne J., following *Lockhart* v. *Reilly* (2) in the year 1856, that, as between two trustees, if one of them is a solicitor, it does make a difference on the question whether one trustee is liable to indemnify his co-trustee, and, I think, reasonably and properly so, because the trustee who is not a solicitor looks reasonably and properly to the trustee who is a solicitor to do that which a solicitor, if he is acting in a businesslike and proper manner, would do. At that point I think West has failed, not only in his duty to his cestui que trust, but in his duty to his co-trustee, who has properly trusted him as the solicitor trustee managing the affairs of this trust. There has, fortunately, been no loss to the estate in this case by reason of this breach of trust; the only loss to which Hartley has been put is that he has been put to the expense of this action.

I think the conclusion I am bound to come to is that West must pay the costs of Hartley, and indemnify him against any costs he may have to pay to the plaintiffs. The order will therefore be that the defendant West do pay the costs of the defendant Hartley as between solicitor and client down to judgment, including any costs of the plaintiffs paid by the defendant Hartley.

Solicitors: *Burch, Whitehead & Davidsons; Crossman, Prichard, Crossman & Block, for Wise & Son, Ripon; Sharpe, Parker, Pritchards, Barham & Lawford.*

(1) [1897] 1 Ch. 536. (2) 25 L. J. (Ch.) 697.

W. C. D.

END OF VOL. II.

The Mode of Citation of the Volumes of the *Law Reports*, commencing January 1, 1904, will be as follows :—

In the First Series,
[1904] 1 Ch. [1904] 2 Ch.

In the Second Series,
[1904] 1 K. B. [1904] 2 K. B. [1904] P.

In the Third Series,
[1904] A. C.

INDEX.

ACCOUNT—Action for—Moneys remitted to agent for special purpose—Express trust - - - - - 233
See LIMITATION, STATUTES OF.

ACCOUNTS—Breach of trust—Negligence—Delay in accounting—Solicitor trustee—Liability to indemnify co-trustee 785
See TRUSTEE.

ACCUMULATIONS—Infant—Maintenance—Contingent legacy—Right to surplus income and accumulations - 685
See INFANT.

ACKNOWLEDGMENT—Married woman—Separate estate—Contract—Acknowledgment of loan made but not creating debt - - - - - 66
See HUSBAND AND WIFE.

ADMINISTRATION—Costs—Taxation—Creditor in administration action—"Party interested" - - - - 363
See PRACTICE. 2.

ADVERTISEMENT—Notice of judgment—Service—Unregistered friendly society—Jurisdiction to wind up - - 196
See BENEFIT SOCIETY.

ADVOWSON—Charitable trust—Trust to appoint a fit and duly qualified person - 643
See CHARITY. 1.

AGENT—Principal and.
See under PRINCIPAL AND AGENT.

AIR—Light and.
See under LIGHT AND AIR.

ALIENATION—Restriction against—Power of jointuring—Power of sale—Settled land - - - - - 289
See REVENUE. 2.

"AMALGAMATION"—Company—"Winding-up for the purpose of reconstruction or amalgamation" - - - 268
See COMPANY. 10.

AMBIGUITY—Explanation by reference to recital in codicil—Gift to a class—Lapse 52
See WILL. 2.

AMENDMENT—Parties—Title to patent at date of writ—Equitable assignee—Legal owner not a party - - - 122
See PATENT. 1.

—— Pleadings—Ouster of Jurisdiction, Omission to plead—Trial of action - - 123
See COMPANY. 7.

ANNUITY—Compound settlement—Deed granting annuities—Settlement by will of grantor's interest in land subject to the annuities - - - - 460
See SETTLED LAND. 3.

APPEAL—Company—Winding-up—Appeal from registrar - - - - 170
See COMPANY. 16.

APPORTIONMENT—Loss—Tenant for life and remainderman—Authorized investment—Mortgage—Deficient security - 160
See SETTLED LAND. 1.

—— Lost capital—Reserve—Reduction of capital—Sanction of Court - - 208
See COMPANY. 12.

APPROACHES—Highway—Bridge, Liability to repair 300 feet from end of - 513
See BRIDGES.

APPROPRIATION—Payments—Income tax—Debenture—Deficient security—Principal or interest - - - 569
See COMPANY. 1.

ARBITRATION—Public authority—Limitation of time for proceedings - - 449
See PUBLIC AUTHORITIES' PROTECTION.

—— Reference, Compulsory—Practice—Pleadings—Ouster of jurisdiction, Omission to plead—Trial of action—Amendment 123
See COMPANY. 7.

ARCHITECT—Certificate not to be conclusive of sufficiency of work or materials—Defective work and materials—Claim for damages - - - 261
See BUILDING CONTRACT.

ARTICLES OF ASSOCIATION—Company.
See under COMPANY.

ASSIGNMENT—Charges on expectancy—Notice to executor—Priority—Assignor executor - - - - 385
See MORTGAGE.

—— Lease — Negative covenant, Right of assignee to enforce—Indemnity - 376
See LANDLORD AND TENANT.

—— Parties—Title to patent at date of writ—Equitable assignee—Legal owner not a party—Amendment - - 122
See PATENT. 1.

—— Pleadings—Ouster of jurisdiction, Omission to plead—Trial of action - - 123
See COMPANY. 7.

ATTORNEY—Power of.
See under POWER OF ATTORNEY.

ATTORNEY-GENERAL—Streets—Infringement of building line—Penalty—Conviction—Subsequent action by Attorney-General for injunction—Laches - 34
See STREETS. 1.

BANK—Mortgage debt—Mortgage insurance policy — Indemnity — Guarantee — Suretyship—Contribution - - 178
See PRINCIPAL AND SURETY.

BANKRUPTCY—*Jurisdiction—County Court—Claim arising out of the Bankruptcy—Lease—Disclaimer—Mortgagees by Demise—Option to take Vesting Order or be excluded—Application by Landlord—Question of Merger—Intention—Evidence—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 102, *sub-s.* 1.

Where a lessee is adjudicated bankrupt in a county court, and his trustee disclaims the lease, an application by the landlord for an order putting mortgagees by demise to their election to take a vesting order of the lease cum onere, or be excluded from all interest, is an application to enforce a claim arising out of the bankruptcy, which could not have been enforced by action in the High Court prior to the Bankruptcy Act, 1883, and therefore by virtue of s. 102, sub-s. 1, the county court has jurisdiction, without any consent of the parties, to decide all questions of law or fact arising on the application, including the question whether the lease is subsisting, or whether it was merged by a temporary coalescence of the freehold and leasehold estates in the lessee.

The lessee's intention to prevent merger may be gathered (inter alia) from his dealings with the property subsequent to the date of coalescence. LEA *v.* THURSBY - - Swinfen Eady J. 57

—— Settlement—Limited power of appointment—Bankruptcy of donee of power—Incapacity of trustee in bankruptcy to release the power - - - 348
See POWER OF APPOINTMENT.

BATHING—Public right of—Foreshore - 313
See SEASHORE. 2.

BENEFIT SOCIETY—*Unregistered Benefit Society—Partnership—Insolvency of Society—Action for Dissolution—Jurisdiction to wind up—Unexpended Funds—Scheme for Distribution—Notice of Judgment—Service—Rules of Supreme Court, Order* LV., *rr.* 35, 35*a*.

In the year 1817 a society for the benefit of the workmen in a company established by Royal Charter was founded, its main objects being to provide, by mutual assistance among its members, aid out of the society's funds towards a comfortable subsistence in times of sickness and old age. Membership was confined to workmen and others in the employment of the company. The members on their admission paid fines varying in amount according to age, and a yearly contribution of 30*s.* to the funds of the society until they attained sixty-five, when they ceased to contribute and became entitled to a pension of 6*s.* a week for life. The society was managed by a general committee in accordance with printed rules which were varied from time to time, the latest being those sanctioned in 1891. The funds stood in the name of the company as trustee. The society was never registered under the Friendly Societies Acts, and there was no provision in the rules for a dissolution. The company had ceased to carry on business, and no new members had been admitted since 1899. There were 439 members, of whom 88 had attained the age of sixty-five; and it was admitted that, with no new members coming in, the society was insolvent, and that the younger members would probably receive nothing if the former allowances for sick pay and pensions were continued. A large majority of pensioners and non-pensioners had voted for a dissolution by the Court, and an action was commenced, in which all classes of members were represented, claiming a dissolution:—

Held, that the Court had jurisdiction to interfere and wind up the society, and to ascertain the rights of all the persons beneficially interested in its assets by a reference to chambers to settle a scheme for the equitable distribution of the remaining funds.

Pearce v. *Piper*, (1809) 17 Ves. 1; 11 R. R. 1, examined and applied.

Held, also, following *In re Printers and Transferrers Amalgamated Trades Protection Society*, [1899] 2 Ch. 184, that the principle to be adopted in calculating the amounts payable to the various members was, that the funds were divisible among existing members at the time of the dissolution in proportion to the amount contributed by each member for fines on admission and subscriptions, irrespective of any payments made in accordance with the rules, and without interest.

Form of advertisement in lieu of service of notice of judgment. *In re* LEAD COMPANY'S WORKMEN'S FUND SOCIETY. LOWES *v.* GOVERNOR AND COMPANY FOR SMELTING DOWN LEAD WITH PIT AND SEA COAL - - Warrington J. 196

BORROWING POWERS—Unauthorized application of funds—Knowledge of director of lending company of intended misapplication - - - - 608
See COMPANY. 5.

BOUNDARY LINE—Foreshore—Conveyance of land bounded by seashore—Parcels—Plan—Dimensions - - 525
See SEASHORE. 1.

BREACH OF TRUST.
See under TRUSTEE.

BRIDGES—*Approaches—Highway—Liability to repair 300 feet from end of Bridge—Statute of Bridges* (22 *Hen.* 8, *c.* 5)—*New River Company's Acts* (3 *Jac.* 1, *c.* 18; 4 *Jac.* 1, *c.* 12)—*New River Company's Charter.*

The rule laid down by the Statute of Bridges, that the persons liable to repair a bridge are also liable to repair the highway adjoining to each end of the bridge for a distance of 300 feet, applies where the bridge is repairable by the county, and where the liability arises by prescription or (*semble*) ratione tenuræ; but it does not apply in cases where the liability is directly imposed by a later statute.

The Acts authorizing the making of the New River directed that bridges should be made where conveuient, and the New River Company's charter bound it to maintain the New River and its bridges:—

Held, that the company were bound to maintain the bridges and the approaches thereto, i.e., so much of the road at each end as had been raised or interfered with by making the bridge, and what the approaches were must be ascertained as a fact in each case. They were not bound to repair 300 feet of the highway in every case. HERTFORDSHIRE COUNTY COUNCIL *v.* NEW RIVER COMPANY - - - **Swinfen Eady J. 513**

BUILDING CONTRACT—*Construction—Architect—Certificate not to be conclusive of Sufficiency of Work or Materials—Defective Work and Materials—Claim for Damages.*

In a contract for the execution of specified works A. was nominated the architect for the purposes of the contract. Clause 16 of the contract empowered the architect to order in writing from time to time the removal of improper materials, the substitution of proper materials, and the removal and proper re-execution of any work not in accordance with the drawings and specification. Clause 17 provided that any defects which might appear within twelve months from the completion of the works, arising, in the opinion of the architect, from materials or workmanship not in accordance with the drawings and specification, should upon the written direction of the architect be made good by the contractor at his own cost, unless the architect should decide that he ought to be paid for the same. Clause 30, after providing for the payment of the contractor under certificates to be issued from time to time by the architect, contained this proviso: "No certificate shall be considered conclusive evidence as to the sufficiency of any work or materials to which it relates, nor shall it relieve the contractor from his liability to make good all defects as provided by this contract." In an action by the contractor against his employer for the amounts due on the certificates which A. had issued under the contract, the employer contended that the proviso in clause 30 entitled him, notwithstanding the certificates, to set off the damages he had sustained by reason of defective work done and materials employed by the contractor in carrying out the contract:—

Held, that clause 30 must be read with clauses 16 and 17, and that, in the absence of fraud or collusion on the part of A., the certificates were conclusive, A. not having made any order under those clauses for defective work to be made good, nor given any direction that the contractor was not to be paid for the same. ROBINS *v.* GODDARD **Farwell J. 261**

BUILDING LINE—Infringement of—Penalty—Conviction — Subsequent action by Attorney - General for injunction — Laches - - - - - 34
See STREETS. 1.

CALLS—Company—Winding-up — Contributory—Forfeited shares - - 468
See COMPANY. 15.

CAPITAL—Income or—Repairs—Sanitary works, Cost of - - - - 561
See SETTLED LAND. 7.

—— Reduction of capital—Sanction of Court—Lost capital—Reserve—Apportionment of loss - - - - 208
See COMPANY. 12.

CAPITAL MONEYS—Settled land.
See under SETTLED LAND.

CASES:—

—— *Allen and Driscoll's Contract, In re*, [1904] 1 Ch. 493.
Affirmed by C. A. - **[1904] 2 Ch. 226**

—— *Alston, In re* - - [1901] 2 Ch. 584
Followed by C. A. *In re* ATKINSON **[1904] 2 Ch. 160**

—— *Attorney-General* v. *Ashbourne Recreation Ground Co.*, [1903] 1 Ch. 101.
Followed by Farwell J. ATT.-GEN. *v.* WIMBLEDON HOUSE ESTATE CO. **[1904] 2 Ch. 34**

—— *Barrow Hæmatite Steel Co., In re*, [1900] 2 Ch. 846; [1901] 2 Ch. 746.
Explained by C. A. *In re* HOARE & CO., LIMITED AND REDUCED **[1904] 2 Ch. 208**

—— *Blundell* v. *Catterall*, (1821) 5 B. & Al. 268; 24 R. R. 353.
Followed by C. A. BRINCKMAN *v.* MATLEY - - - **[1904] 2 Ch. 313**

—— *Bowden's (E. M.) Patents Syndicate, Ld.* v. *Herbert Smith & Co.*, [1904] 2 Ch. 122.
Affirmed by C. A. - **[1904] 2 Ch. 122**

—— *Brown* v. *Gellatly* (1867) L. R. 2 Ch. 751
Principle of, applied by Kekewich J. *In re* WOODS - - **[1904] 2 Ch. 4**

—— *Brown & Gregory, Ld., In re. Shepheard* v. *Brown & Gregory, Ld. Andrews* v. *Brown & Gregory, Ld.*, [1904] 1 Ch. 627.
Affirmed by C. A. - **[1904] 2 Ch. 448**

—— *Browne* v. *Savage* - (1859) 4 Drew. 635
Referred to by C. A. *In re* DALLAS **[1904] 2 Ch. 385**

CASES—*continued.*

—— *Caledonian Ry. Co.* v. *Greenock and Wemyss Bay Ry. Co.*, (1874) L. R. 2 H. L., Sc. 347.
Considered by C. A. JOSEPH CROSFIELD & SONS, LD. *v.* MANCHESTER SHIP CANAL CO. - - - [1904] 2 Ch. 123

—— *Caton* v. *Caton* - (1866) L. R. 1 Ch. 137
Dictum in, considered by Kekewich J. DICKINSON *v.* BARROW [1904] 2 Ch. 339

—— *Chauncy* v. *Graydon* (1743) 2 Atk. 616, 619
Considered by C. A. *In re* LEWIS [1904] 2 Ch. 656

—— *Church Patronage Trust, In re. Laurie* v. *Attorney-General*, [1904] 1 Ch. 41.
Affirmed by C. A. - [1904] 2 Ch. 643

—— *Consett Waterworks Co.* v. *Ritson*, (1889) 22 Q. B. D. 318, 702; 64 L. J. (Ch.) 293, n.
Considered by C. A. BISHOP AUCKLAND INDUSTRIAL CO-OPERATIVE SOCIETY, LD. *v.* BUTTERKNOWLE COLLIERY CO., LD. [1904] 2 Ch. 419

—— *Craythorne* v. *Swinburne*, (1807) 14 Ves. 160; 9 R. R. 264.
Applied by C. A. *In re* DENTON'S ESTATE - - [1904] 2 Ch. 178

—— *Darley* v. *Martin* - (1853) 13 C. B. 683
Followed by Joyce J. *In re* VENN [1904] 2 Ch. 52

—— *Davis's Case* - (1871) L. R. 12 Eq. 516
Overruled on one point by C. A. *In re* DAVID PAYNE & CO. [1904] 2 Ch. 608

—— *Day* v. *Singleton* - [1899] 2 Ch. 320
Distinguished by Swinfen Eady J. PEASE *v.* COURTNEY [1904] 2 Ch. 503

—— *Dean* v. *Dean* - - [1891] 3 Ch. 150
Approved and followed by C. A. *In re* WRIGHTSON - - [1904] 2 Ch. 95

—— *Dearle* v. *Hall*, (1828) 3 Russ. 1; 27 R. R. 1.
Rule in, applied by C. A. *In re* DALLAS [1904] 2 Ch. 385

—— *Denton's Estate, In re* - [1903] 2 Ch. 670
Reversed by C. A. - [1904] 2 Ch. 178

—— *Ellis* v. *Selby*, (1836) 1 My. & Cr. 292; 43 R. R. 188.
Dictum of Lord Cottenham in, not followed by Farwell J. *In re* BEST [1904] 2 Ch. 354

—— *Foster, In re* - (1890) 45 Ch. D. 629
Overruled by C. A. *In re* ATKINSON [1904] 2 Ch. 160

—— *General Accident Assurance Corporation, In re*, [1904] 1 Ch. 147.
Not followed by Buckley J. *In re* TAYLOR'S AGREEMENT TRUSTS [1904] 2 Ch. 737

—— *George Whitechurch, Ld.* v. *Cavanagh*, [1902] A. C. 117, 145.
Applied by Swinfen Eady J. PORTER *v.* MOORE - - [1904] 2 Ch. 367

—— *Goy & Co., In re* - [1900] 2 Ch. 149
Distinguished by Buckley J. *In re* PALMER'S DECORATION AND FURNISHING CO. - - - [1904] 2 Ch. 743

CASES—*continued.*

—— *Gray, In re* - - [1901] 1 Ch. 239
Approved and adopted by C. A. *In re* LONGBOTHAM & SONS [1904] 2 Ch. 152

—— *Grover* v. *Raper* - (1856) 5 W. R. 134
Followed by Joyce J. *In re* VENN [1904] 2 Ch. 52

—— *Hirst, In re* - - [1892] W. N. 177
Followed by Farwell J. *In re* ROSE [1904] 2 Ch. 348

—— *Jemmit* v. *Verril*, cited in (1826) Amb. 585, n.
Referred to by Farwell J. *In re* BEST [1904] 2 Ch. 354

—— *Johnstone* v. *Cox*, (1880) 16 Ch. D. 571; (1881) 19 Ch. D. 17.
Followed by C. A. *In re* DALLAS [1904] 2 Ch. 385

—— *Lechmere and Lloyd, In re*, (1881) 18 Ch. D. 524.
Approved and followed by C. A. *In re* WRIGHTSON - - [1904] 2 Ch. 95

—— *Highett and Bird's Contract, In re*, [1903] 1 Ch. 287.
Explained by C. A. *In re* ALLEN AND DRISCOLL'S CONTRACT [1904] 2 Ch. 226

—— *Leadbitter, In re* - (1878) 10 Ch. 388
Explained by Buckley J. *In re* JONES & EVERETT - - [1904] 2 Ch. 363

—— *Lewis, In re* - - [1900] 2 Ch. 176
Distinguished by Swinfen Eady J. *In re* CAYLEY - - [1904] 2 Ch. 781

—— *Lockhart* v. *Reilly* (1856) 25 L. J. Ch. 697
Applied by Warrington J. *In re* LINSLEY - - - [1904] 2 Ch. 785

—— *London, Chatham and Dover Ry. Co.* v. *South Eastern Ry. Co.*, (1888) 40 Ch. D. 100.
Considered by C. A. JOSEPH CROSFIELD & SONS, LD. *v.* MANCHESTER CANAL CO. [1904] 2 Ch. 123

—— *Low* v. *Bouverie* - [1891] 3 Ch. 82, 113
Applied by Swinfen Eady J. PORTER *v.* MOORE - - [1904] 2 Ch. 367

—— *Lynch Blosse, In re* [1899] W. N. 27 (8)
Followed by Kekewich J. *In re* WOODS [1904] 2 Ch. 4

—— *Marlborough's (Duke of) Settlement, In re*, (1885) 30 Ch. D. 127; (1886) 32 Ch. D. 1
Distinguished by Warrington J. *In re* LORD STAFFORD'S SETTLEMENT AND WILL - - - [1904] 2 Ch. 72

—— *Mason's Orphanage and London and North Western Ry. Co.*, [1896] 1 Ch. 596.
Applied by Kekewich J. ATTORNEY-GENERAL *v.* NATIONAL HOSPITAL FOR THE RELIEF AND CURE OF THE PARALYSED AND EPILEPTIC - - [1904] 2 Ch. 252

—— *Mayne* v. *Mayne* - [1897] 1 I. R. 324
Followed by Warrington J. *In re* WHEELER - - [1904] 2 Ch. 66

—— *Miles* v. *Jarvis* - (1883) 24 Ch. D. 633
Approved and followed by C. A. *In re* WRIGHTSON - - [1904] 2 Ch. 95

—— *Moore, In re* - (1885) 54 L. J. (Ch.) 432
Followed by C. A. *In re* ATKINSON [1904] 2 Ch. 160

CASES—*continued.*

—— *New Sharlston Collieries Co.* v. *Westmorland (Earl of)*, noted at [1904] 2 Ch. 443.
Referred to by C. A. BISHOP AUCKLAND INDUSTRIAL CO-OPERATIVE SOCIETY, LD. *v.* BUTTERKNOWLE COLLIERY CO. - **[1904] 2 Ch. 419, 435, 443**

—— *North American Land and Timber Co.* v. *Watkins*, [1904] 1 Ch. 242.
Affirmed by C. A. - **[1904] 2 Ch. 233**

—— *Pearce* v. *Piper*, (1809) 17 Ves. 1; 11 R. R. 1
Examined and applied by Warrington J. *In re* LEAD COMPANY'S WORKMEN'S FUND SOCIETY - **[1904] 2 Ch. 196**

—— *Phillimore, In re* - [1903] 1 Ch. 942
Overruled by C. A. *In re* ATKINSON **[1904] 2 Ch. 160**

—— *Pimm, In re* - - [1904] 2 Ch. 345.
Followed by Swinfen Eady J. *In re* CAYLEY - - **[1904] 2 Ch. 781**

—— *Poole and Clarke's Contract, In re*, [1904] 2 Ch. 173.
Observations in, discussed and applied by Warrington J. HARRIS *v.* BOOTS, CASH CHEMISTS (SOUTHERN), LD. **[1904] 2 Ch. 376**

—— *Price* v. *Torrington (Earl of)*, (1703) 1 Salk. 285.
See MELLOR *v.* WALMESLEY
Swinfen Eady J. **[1904] 2 Ch. 525**

—— *Printers and Transferrers Amalgamated Trades Protection Society, In re*, [1899] 2 Ch. 184.
Followed by Warrington J. *In re* LEAD COMPANY'S WORKMEN'S FUND SOCIETY **[1904] 2 Ch. 196**

—— *Pugh* v. *Drew* - - (1869) W. R. 988
Followed by Joyce J. *In re* TRINGHAM'S TRUSTS - **[1904] 2 Ch. 487**

—— *Ridout* v. *Fowler* - [1904] 1 Ch. 658
Affirmed by C. A. - **[1904] 2 Ch. 93**

—— *Russel* v. *Buchanan*, (1836) 7 Sim. 628; 2 Cr. & M. 561; 40 R. R. 193.
Distinguished by C. A. *In re* WRIGHTSON - - - **[1904] 2 Ch. 95**

—— *Scott, In re* - - [1902] 1 Ch. 918
Disapproved by C. A. *In re* BOWLBY **[1904] 2 Ch. 685**

—— *Scott's Patent, In re*, (1903) 20 Rep. Pat. Cas. 604.
Observed on by Buckley J. *In re* CLIFTON'S PATENT - **[1904] 2 Ch. 357**

—— *Smith* v. *Law Guarantee and Trust Society, Ld.*, [1904] 1 Ch. 500.
Affirmed with a slight variation by C. A. **[1904] 2 Ch. 569**

—— *Spark's Trusts, In re* - [1904] 1 Ch. 451
Compromised on appeal **[1904] 2 Ch. 121**

—— *Sutherland (Dowager Duchess of)* v. *Sutherland (Duke of)*, [1893] 3 Ch. 169.
Followed by Swinfen Eady J. PEASE *v.* COURTNEY - **[1904] 2 Ch. 503**

—— *Sutton, In re* - (1885) 28 Ch. D. 464
Followed by Farwell J. *In re* BEST **[1904] 2 Ch. 354**

CASES—*continued.*

—— *Taddy & Co.* v. *Sterious & Co.*, [1904] 1 Ch. 354.
Approved and adopted by C. A. MCGRUTHER *v.* PITCHER. **[1904] 2 Ch. 306**

—— *Tubbs* v. *Wynne* - [1897] 1 Q. B. 74
Distinguished by C. A. *In re* ALLEN AND DRISCOLL'S CONTRACT **[1904] 2 Ch. 226**

—— *Turner* v. *Rookes*, (1839) 10 Ad. & E. 47; 50 R. R. 320.
Principle of, no longer applicable. *In re* WINGFIELD & BLEW **[1904] 2 Ch. 665**

—— *Twycross* v. *Grant* (1877) 2 C. P. D. 542
Definition of "knowingly issuing" given by Cockburn C.J. in, considered by C. A. TAIT *v.* MACLEAY - **[1904] 2 Ch. 631**

—— *Union Lighterage Co.* v. *London Graving Dock Co.*, [1902] 2 Ch. 557.
Principle of, applied by Kekewich J. RAY *v.* HAZELDINE - **[1904] 2 Ch. 17**

—— *Ward* v. *Duncombe* - [1893] A. C. 369
Applied by C. A. *In re* DALLAS **[1904] 2 Ch. 385**

—— *Werner Motors, Ld.* v. *A. W. Gamage, Ld.*, [1904] 1 Ch. 264.
Affirmed by C. A. - **[1904] 2 Ch. 580**

—— *Wheeldon* v. *Burrows* (1879) 12 Ch. D. 31
Distinguished by Kekewich J. RAY *v.* HAZELDINE - - **[1904] 2 Ch. 17**

—— *Whiston's Settlement, In re*, [1894] 1 Ch. 661
Considered and distinguished by Joyce J. *In re* TRINGHAM'S TRUSTS **[1904] 2 Ch. 487**

CERTIFICATE—Building contract—Architect—Defective work and materials—Damages
See BUILDING CONTRACT. 261

CHARITY—*Advowson—Trust to appoint a fit and duly qualified Person—Charitable Trust.*

The owner of an advowson transferred it to trustees upon trust from time to time as a vacancy occurred to appoint to the living a fit and pious person of godly life and conversation, being in holy orders and capable of holding the same; and the trust deed provided that three at least of the full number of five trustees should be clergymen of the Church of England, and that only those should be eligible as trustees who should be of godly life and conversation, and should profess themselves members of the Established Church, and should be known to be zealously attached to the principles of the Reformed Faith contained in the Liturgy and Articles of the Established Church:—

Held, not a charitable trust, inasmuch as the deed contained no cestui que trust, and merely provided for the due performance of the duty cast by law upon every legal owner of an advowson to appoint a fit and duly qualified person to the living.

Decision of Buckley J., [1904] 1 Ch. 41, affirmed. *In re* CHURCH PATRONAGE TRUST. LAURIE *v.* ATTORNEY-GENERAL - **C. A. 643**

2. —— *Land Transfer — Consent of Charity Commissioners to Sale of Charity Lands—Entry on Register with Restriction—Royal Charter —*

CHARITY—*continued.*

Charitable Trusts Amendment Act, 1855 (18 & 19 *Vict.* c. 124), s. 29—*Land Transfer Rules*, 1903, *rr.* 29, 83, *Sched. I., Form* 13.

A Royal Charter incorporating a charity (though containing provisions for the management of the charity and a power to the charity to sell lands) is not a "scheme legally established" within s. 29 of the Charitable Trusts Amendment Act, 1855, so as to exempt the charity from the necessity of obtaining the consent of the Charity Commissioners to a sale of its lands.

In re Mason's Orphanage and London and North Western Ry. Co., [1896] 1 Ch. 596, applied. ATTORNEY-GENERAL *v.* NATIONAL HOSPITAL FOR THE RELIEF AND CURE OF THE PARALYSED AND EPILEPTIC - - - **Kekewich J. 252**

3. —— *Uncertainty—Gift for "Charitable and Benevolent Institutions" not void for Uncertainty—Will—Construction.*

A bequest of residue upon trust for "such charitable and benevolent institutions" as the trustees shall in their discretion determine is not void for uncertainty, but is a good charitable gift.

In re Sutton, (1885) 28 Ch. D. 464, followed.

Dictum of Lord Cottenham in *Ellis* v. *Selby*, (1836) 1 My. & Cr. 292; 43 R. R. 188, disapproving of *Jemmit* v. *Verril*, cited in (1826) Amb. 585, n., not followed. *In re* BEST. JARVIS *v.* CORPORATION OF BIRMINGHAM - **Farwell J. 354**

—— School—Endowment—Trust deed—Forfeiture—Gift over to residue—Perpetuities *See* WILL. 3. **767**

CHARTER.
See under ROYAL CHARTER.

CHARTS—Evidence—Maps—Public documents—Ancient reports to Government departments—Depositions - - **534**
See CUSTOM.

CLASS—Ambiguity—Explanation by reference to recital in codicil—Gift to a class—Lapse - - - - - **52**
See WILL. 2.

CODICIL—Ambiguity—Explanation by reference to recital in codicil—Gift to a class—Lapse - - - - - **52**
See WILL. 2.

COHABITATION — Resumption of — Settlement on children on marriage - - **121**
See SEPARATION DEED.

COMPANIES (WINDING-UP) RULES, 1903, r. 7 *See* COMPANY. 16. **170**

—— —— r. 201 - - - - - **359**
See COMPANY. 19.

COMPANY — *Debenture — Deficient Security — Principal or Interest—Appropriation of Payments—Income Tax.*

A debenture trust deed executed by a company provided that the trustees should appropriate the proceeds of the realization of the securities in the first place towards payment of all arrears of interest on the debentures, and, secondly, towards payment of the principal. The company made default, and an action was brought on behalf of the debenture-holders to enforce their security. The judgment in the action ordered that the trusts of the deed should be carried into execution, and directed that the usual accounts and inquiries should be taken and made. The securities were gradually realized, and orders were from time to time made under which certain sums were paid to the debenture-holders on account of interest, after deducting income tax. When the order on further consideration was made there was evidence that the securities would prove insufficient, and that order directed that the plaintiffs' taxed costs as between solicitor and client should be paid by the trustees out of the moneys in their hands. The subsequent orders for payment to the debenture-holders directed that the payments should be made on account generally of what was due for principal and interest. The securities having been practically all realized, the trustees had in their hands a sum of money which they proposed to pay to the debenture-holders. It was admitted that if the whole of the payments to the debenture-holders were attributed to principal they would be insufficient to discharge the full amount due. The Commissioners of Inland Revenue claimed that all the payments made on account generally ought to be attributed to interest in the first place, and that income tax should be deducted from them. Upon a summons taken out by the trustees of the deed to determine this question:—

Held, upon the construction of the orders which directed payments on account generally, and having regard to the circumstances of the case, that the Court when making those orders had purposely left open for future determination the question how the payments were to be ultimately appropriated as between principal and interest, and that, it being now clearly for the benefit of the debenture-holders that those payments should be appropriated to principal, they ought to be so appropriated, without putting the debenture-holders to an election how the appropriation should be made, and consequently that income tax ought not to be deducted.

But the order was made without prejudice to the question whether the payments, or any part or parts thereof, ought, in the hands of the persons to whom payments had been made, to be treated as principal or interest.

Decision of Byrne J., [1904] 1 Ch. 500, affirmed with a slight variation. SMITH *v.* LAW GUARANTEE AND TRUST SOCIETY, LIMITED - **C. A. 569**

2. —— *Debentures—Registered Holder—Equities of Company against Transferor—Rights of Transferee for Value without Notice.*

A company issued to B. debentures each of which contained a covenant to pay the moneys thereby secured, in accordance with the conditions indorsed thereon, to B. or other the registered holder for the time being. The principal moneys secured became immediately payable in the event of a resolution for winding-up being passed. The conditions indorsed provided as follows:—

"(3.) The registered holder . . . . will be regarded as exclusively entitled to the benefit of this debenture, and all persons may act accord-

COMPANY—*continued.*

ingly; and the company shall not be bound to enter in the register notice of any trust or to recognise any right in any other person save as herein provided.

"(4.) Every transfer of this debenture must be in writing under the hand of the registered holder . . . . and must be delivered at the registered office of the company with . . . . such evidence of identity or title as the company may reasonably require, and thereupon the transfer will be registered."

"(8.) The principal moneys and interest hereby secured will be paid without regard to any equities between the company and the original or any intermediate holder thereof, and the receipt of the registered holder for such principal moneys or interest shall be a good discharge to the company therefor."

After a resolution for winding up the company had been passed, B. transferred the debentures for value to C., who took without notice of any defect in the title of B. thereto.

Notice of the transfer was given to the liquidator, but no demand for registration of the transfer was made.

On a claim by C. in the winding-up that he was entitled to the benefit of the debentures, the Court found that B. had paid nothing for them, but had obtained them from the company by misrepresentation:—

Held, that, notwithstanding the conditions, the rights of the company against B. prevailed over the title of C., and that C. was not entitled to the benefit of the debentures.

In re Goy & Co., [1900] 2 Ch. 149, distinguished. *In re* PALMER'S DECORATION AND FURNISHING COMPANY - - **Buckley J. 743**

3. —— *Debentures — Transfer—Purchase by Company of Debenture issued by itself—Registered Owner—Subsequent Transfer to Purchaser for Value.*

Under powers contained in its memorandum and articles of association the company issued a series of 750 first mortgage debentures of 100*l.* each, to rank pari passu as a first charge on the assets of the company. All the debentures were issued. From time to time some of them came into the market, and sixteen of them were there purchased by the company itself. These debentures were in each case transferred to "George Routledge & Sons, Limited," by transfers in common form, and a note of the transfer was indorsed on the debenture. The company proceeded to enter upon the register of debenture-holders the name of the company itself as registered owner of the debenture in question. Subsequently the company transferred these debentures to various persons by transfers in common form, in which the transferor's name was given as "George Routledge & Sons, Limited," and a note of the transfer was indorsed on the debenture:—

Held, that the result of the transfer of the debentures to the company was that in each case the debt was absolutely gone, and that the security had therefore also ceased to exist; the transferees from the company had acquired nothing by the transfers to them, and were not

COMPANY—*continued.*

entitled to receive new debentures ranking pari passu with those of the issue of 75,000*l.* *In re* GEORGE ROUTLEDGE & SONS, LIMITED. HUMMEL *v.* GEORGE ROUTLEDGE & SONS, LIMITED **Buckley J. 474**

4. —— *Debentures—Transfer of Debentures—Claim by Company against Transferor—Registered Holder—Rights against Transferee—Trustee for Creditors—Debenture-holder's Action.*

Decision of Byrne J., [1904] 1 Ch. 627, affirmed. *In re* BROWN & GREGORY, LIMITED. SHEPHEARD *v.* BROWN & GREGORY, LIMITED. ANDREWS *v.* BROWN & GREGORY, LIMITED **C. A. 448**

5. —— *Debenture—Ultra Vires—Borrowing Powers—Unauthorized Application of Funds—Knowledge of Director of lending Company of intended Misapplication—Imputed Notice.*

Where a company has a general power to borrow money for the purposes of its business, a lender is not bound to inquire into the purposes for which the money is intended to be applied, and the misapplication of the money by the company does not avoid the loan in the absence of knowledge on the part of the lender that the money was intended to be misapplied.

Davis's Case, (1871) L. R. 12 Eq. 516, overruled on this point.

K., who was the director of company A. and was also interested in company B., having ascertained in his private capacity that company B. proposed to borrow a sum of money for a purpose outside the scope of its business, induced company A. to advance the money to company B. on the security of a debenture of that company, and the money was applied by company B. in the manner proposed. Company B. had a general power of borrowing under its memorandum and articles of association for the purposes of its business. No other director of company A. except K. knew how the money was intended to be applied:—

Held, that K.'s knowledge ought not to be imputed to company B., inasmuch as K. owed no duty to that company either to receive or to disclose information as to how the borrowed money was to be applied, and that the debenture was a valid security.

Decision of Buckley J. affirmed. *In re* DAVID PAYNE & Co. YOUNG *v.* DAVID PAYNE & Co. **C. A. 608**

6. —— *Debenture—Validity—Ultra vires—Joint Debentures issued by three Companies—Joint and several Covenant to pay—Charge by Companies respectively on their several Undertakings and Assets—Proceeds applied in Part to use of each Company—Articles of Association—Construction—Power to raise Money "not exceeding Amount of Preference Share Capital."*

Three companies, each of which had power to borrow money on the security of debentures, issued joint debentures, by which the companies jointly and severally agreed to pay to the holder the amount advanced by him, with interest thereon; and the three companies thereby respectively charged with such payments their several undertakings and all their present and future properties and assets. Each of the companies

COMPANY—*continued.*
received a part of the proceeds of the debentures:—

Held, that, though it was ultra vires for any of the companies to charge its assets with money advanced to another company, yet, to the extent to which the money advanced had come to the hands of each company, the debentures constituted a valid charge upon the assets of that company.

Decision of Byrne J., that the debentures were entirely void, reversed.

The articles of association of a company empowered the directors to borrow any sum of money, not exceeding the amount of the preference share capital of the company, on the security of the property of the company by (inter alia) debentures. No preference share capital having been issued:—

Held, that this clause did not limit the amount which could be raised on the security of debentures. *In re* JOHNSTON FOREIGN PATENTS COMPANY. *In re* JOHNSTON DIE PRESS COMPANY. *In re* JOHNSTONIA ENGRAVING COMPANY. J. P. TRUST, LIMITED *v.* THE ABOVE COMPANIES
C. A. 234

7. —— *Practice—Jurisdiction—Private Act—Statutory Obligations—Statutory Agreement—Public and Private Rights—Protective Enactments—Default of Company—Disputes—Arbitration Clause—Compulsory Reference—Declaration of Rights, Action for—Damages—Injunction—Jurisdiction, Ouster of—Construction of Statute—Dismissal of Action—Staying Action till further Order—Practice—Pleading—Ouster of Jurisdiction, Omission to plead—Trial of Action—Amendment.*

An arbitration clause in a private Act of Parliament, such as a Railway or Canal Act, will oust the jurisdiction of the Court in any case of difference between the parties named falling within the language of the clause, where the clause, either by express words or by necessary implication, imposes upon both parties an obligation of such a nature as to force them to have their differences settled, not by the ordinary tribunals of the country, but by reference to arbitration, and not merely to render it the duty of the Court to enforce the clause when either party insists on a reference to arbitration.

Sect. 88 of a Canal Act of 1885 enacted that "for the protection of the corporation of W. and of traders and others carrying on business at or near W. the following provisions, unless otherwise agreed on between the corporation and the company, shall have effect." Then followed numerous sub-sections imposing obligations on the company, some for the benefit of the corporation, others for the benefit of the traders, and others for the benefit of both. A further subsection provided that "If any difference shall arise between the company and the corporation as to the true intent and meaning of this section, or as to anything to be done or not to be done thereunder, such difference shall be determined by an engineer" to be appointed as therein mentioned.

In 1896, the company having failed to carry out certain of their statutory obligations, an agreement was entered into between them and

COMPANY—*continued.*
the corporation of W. (no traders of W. being parties) modifying those obligations and conferring certain additional rights upon the traders, and also providing that, save as therein mentioned, nothing therein should affect the rights of the corporation and the traders under any Acts relating to the company or otherwise. Then followed an arbitration clause substantially similar, mutatis mutandis, to that in the Act of 1885. That agreement was scheduled to and confirmed by an Act of 1896 conferring further powers on the company.

The company, however, failed to carry out their obligations under their two Acts and the agreement, and an action was accordingly brought against them by certain traders of W., both individually and on behalf of themselves and all other traders of W., and by the corporation, to enforce those obligations. At the trial a preliminary objection was taken by the company, which had not been raised by the pleadings, that by the Acts and agreement the jurisdiction of the Court was ousted and the questions in dispute should be determined by arbitration; but the objection was overruled by Byrne J., who eventually gave judgment for the plaintiffs. On appeal, the defendants again raised the objection:—

Held, by Vaughan Williams and Stirling L.JJ., that the objection prevailed as to both the traders and the corporation, but, by Cozens-Hardy L.J., as to the corporation only.

Caledonian Ry. Co. v. *Greenock and Wemyss Bay Ry. Co.*, (1874) L. R. 2 H. L., Sc. 347, and *London, Chatham and Dover Ry. Co.* v. *South Eastern Ry. Co.*, (1888) 40 Ch. D. 100, considered.

In a proper case the Court will allow an objection of ouster of jurisdiction to be raised at the trial of an action, though not previously raised by the pleadings, and will treat the pleadings as amended accordingly. JOSEPH CROSFIELD & SONS, LIMITED *v.* MANCHESTER SHIP CANAL COMPANY - - - - **C. A. 123**

8. —— *Prospectus—Non-disclosure of Contracts—Directors' Liability—Advance Copy—Unauthorized Issue—Ratification—"Knowingly issuing"—Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 38.

A director of a company cannot be made liable under s. 38 of the Companies Act, 1867, for culpable omissions in a prospectus issued without his previous knowledge or authority, although he subsequently ratifies it and derives an advantage from it.

Advance copies of a prospectus which was eventually approved and issued by the directors without material alteration were issued without the knowledge or authority of the directors. The prospectus omitted to disclose a material contract within s. 38. Subsequently applications for shares made on the faith of the advance copies were accepted by the directors, as the Court inferred, with knowledge of all the facts:—

Held, that the directors had not "knowingly issued" the advance copies within the meaning of s. 38, and were not liable under the section in respect of that issue. HOOLE *v.* SPEAK
Kekewich J. 732

COMPANY—*continued.*

9. —— *Prospectus—Non-disclosure of Contracts —Director's Liability—"Knowingly issuing"—Plea of Ignorance—Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 38.

A director issued a prospectus which omitted to disclose a contract in accordance with the requirements of s. 38 of the Companies Act, 1867; but at the meeting of directors at which the prospectus was approved he forgot the existence of the contract in question, although the minutes of the previous meeting, at which this contract was considered, were read and confirmed in his presence, and although he had himself approved the contract. He had, however, a general knowledge of the existence of contracts which might fall within the section, and he made no inquiry into these contracts, but relied upon the assurance of the company's solicitor that the prospectus disclosed all contracts which the section required to be disclosed:—

Held, that he "knowingly issued" the prospectus within the meaning of s. 38.

Decision of Kekewich J. affirmed.

The definition of "knowingly issuing" given by Cockburn C.J. in *Twycross* v. *Grant*, (1877) 2 C. P. D. 542, considered.

Per Romer L.J.: The first part of s. 38 of the Companies Act, 1867, imposes upon a director who is settling and issuing a prospectus the duty of inquiring what contracts there are in existence which ought to be set out in the prospectus; and if a director knows generally that there are contracts in existence which may or may not fall within the section, but does not inquire into those contracts, so that he can truthfully say that he had no knowledge of any contracts in particular which ought to be set forth in the prospectus, he cannot excuse himself from liability under the section on the plea of ignorance, if it afterwards turns out that some of the contracts of which he had a general knowledge were contracts which ought to have been set out, and which he would have ascertained if he had made proper inquiries. TAIT *v.* MACLEAY C. A. 631

10. —— "*Reconstruction*"—"*Amalgamation*" —"*Winding-up for the Purpose of Reconstruction or Amalgamation.*"

Neither "reconstruction" nor "amalgamation" has any definite legal meaning. Each word is a commercial and not a legal term, and even as a commercial term has no exact definite meaning.

Where an undertaking is being carried on by a company, and is in substance preserved and transferred, not to an outsider, but to another company, consisting substantially of the same shareholders, with a view to its being continued by the transferee company, that is a reconstruction; and it is none the less a reconstruction because all the assets do not pass to the new or resuscitated company, and all the shareholders of the transferor company are not shareholders in the transferee company, and the liabilities of the transferor company are not taken over by the transferee company.

To constitute "amalgamation" there must be a blending of substantially two or more existing undertakings into one undertaking, the shareholders of each blending company becoming substantially the shareholders in the company which holds the blended undertakings; and there may be amalgamation either by the transfer of two or more undertakings to a new company, or by the transfer of one or more undertakings to an existing company.

COMPANY—*continued.*

It is not necessary that a resolution for winding-up should refer to "reconstruction" or "amalgamation" in order to constitute a "winding-up for the purpose of reconstruction or amalgamation," but the purpose of the winding-up may be gathered from the whole of the circumstances which result in reconstruction or amalgation.

The S. Company had powers under its memorandum of association to amalgamate with any other company, and to sell its undertaking, or any part thereof, for shares or debenture stock of any other company, and under its articles of association the liquidator, in the case of winding-up, had power to divide amongst the contributories in specie any part of its assets. Its memorandum of association also gave to its preference shareholders the right in the event of "a winding-up for the purpose of reconstruction or amalgamation" to a bonus by way of percentage on the par value of the preference shares.

The S. Company issued debenture stock, constituted and secured by a trust deed under which the stock was redeemable only at a premium in the event of the security becoming enforceable by reason of "a voluntary winding-up of the company for the purpose of reconstruction or amalgamation."

After the S. Company had carried on business for a short time, a rival company, the I. Company, was formed; and accordingly in February, 1902, the A. Company was incorporated to take over the business and certain of the assets of the S. Company. The memorandum of association and debenture stock deed of the A. Company gave to its preference shareholders and debenture stock holders respectively rights to a bonus and premium in the case of a winding-up of that company "for the purpose of reconstruction or amalgamation."

In the same month the A. Company agreed with the S. Company to purchase the business and some of the assets of the latter for 1,000,000*l.*, to be satisfied in cash and in fully paid preference and ordinary shares and debenture stock of the A. Company. The remaining (unsold assets) of the S. Company consisted of cash, investments, and other things of the value of over 1,500,000*l.*

In May, 1902, the C. Company was incorporated with (after an increase of capital) an ordinary capital twice the amount of the ordinary capital of the S. Company, and a preference capital equal to the preference capital of the S. Company.

In August, 1902, "heads of agreement" (formally entered into by an agreement of May, 1903) were entered into under which the A. Company was to sell to the I. Company the business and assets purchased by the former from the S. Company, and the stock-in-trade and working capital of the A. Company. The purchase consideration was to be 1,650,000*l.*, to be satisfied as follows: 1,000,000*l.* in fully paid

COMPANY—*continued.*

shares of the I. Company, representing the 1,000,000*l.* ordinary share capital of the A. Company; 500,000*l.* in debentures of the I. Company, to replace the preference share capital and debenture stock of the A. Company; and 150,000*l.* payable to certain firms interested in the I. Company. There was no provision that the A. Company should wind itself up, but 500*l.* was to be retained out of its assets for liquidation expenses. At a meeting of the A. Company held in September, 1902, a distribution on the lines above indicated was mentioned in speeches by the chairman of the company and others.

In view of an agreement of February, 1903 (referred to below), a meeting of the S. Company was held at which the chairman and others referred to an intended winding-up of the company, and to the manner in which the shares of the C. Company were to replace the shares in the S. Company.

By an agrement of February, 1903, the S. Company agreed to sell to the C. Company all its remaining assets (including the shares in the A. Company, to which it was entitled as the consideration for the previous sale to that company), excepting assets of the value of 295,000*l.* retained to pay the debts of the S. Company. The consideration for this sale was to be the whole of the 618,000 ordinary shares, and 150,000 preference shares of the C. Company, to be allotted as fully paid up.

Subsequently both the A. Company and the S. Company passed special resolutions simply for voluntary winding-up, without referring to any amalgamation or reconstruction, or consideration or distribution of shares. At one of the meetings of the S. Company for passing the resolution of that company, reference was made by the chairman to the proposed distribution of the C. Company's shares. Afterwards the S. Company passed an extraordinary resolution authorizing its liquidators to distribute in specie amongst its contributories in the proportion of two shares for every ordinary share in the S. Company the 618,000 ordinary shares in the C. Company which formed part of the consideration referred to in the agreement of February, 1903:—

Held, that there was a "reconstruction" of the S. Company, and that its winding-up was "for the purpose of reconstruction":

Held, also, that there was an "amalgamation" of the A. Company with the I. Company, and that the winding-up of the A. Company was "for the purpose of amalgamation." *In re* SOUTH AFRICAN SUPPLY AND COLD STORAGE COMPANY. WILD *v.* SAME COMPANY - **Buckley J. 268**

11. —— *Reconstruction—Ultra Vires—Memorandum of Association—Powers—Power to sell Undertaking for Shares in another Company and to distribute same in Specie—Sale in exercise of Powers of Memorandum—Sale of Undertaking to New Company for partly paid Shares—Winding-up—Option to Shareholders of Old Company to take up New Shares—Time Limit for exercising Option—Forfeiture of Shareholders' Interest in default—Realization of rejected Shares and Application of Proceeds in Reduction of Purchase-money*

COMPANY—*continued.*

—Companies Act, 1862 (25 *&* 26 *Vict. c.* 89), *ss.* 133, 161.

A company was empowered by its memorandum of association to sell its undertaking for shares in any other company, whether wholly or partly paid up, and to distribute the shares in specie, but so that no distribution amounting to a reduction of capital could be made without the sanction of the Court. The capital of the company having been fully paid up, and the company being in need of further capital, a scheme of reconstruction was adopted whereby the undertaking of the company was to be sold to a new company in consideration (among other things) of partly paid shares in the new company of the same number and nominal amount as the fully paid shares in the old company, and the shareholders in the old company were to have the option of taking those new shares in exchange for their existing shares; and in the event of the old company going into liquidation within a certain period after the completion of the purchase and distributing the shares of the new company, the liquidator was to fix a time within which the new shares were to be taken up; and any shares not accepted within that time were to be realized and applied in reduction of the obligations of the new company under the scheme. This scheme was embodied in an agreement entered into between the two companies:—

Held (affirming Joyce J.), that the agreement was not a contract for sale within the contemplation of the memorandum of association, but was a device to compel fully paid shareholders to contribute further capital or forfeit their interest in the company, and that it was ultra vires. MANNERS *v.* ST. DAVID'S GOLD AND COPPER MINES, LIMITED - - - - - **C. A. 593**

12. —— *Reduction of Capital—Sanction of Court—Lost Capital—Reserve—Apportionment of Loss—Companies Act*, 1877 (40 *&* 41 *Vict. c.* 26), *s.* 3.

Under the Companies Act, 1877, the capital of a company may be reduced if any capital (1) has been lost, or (2) is unrepresented by available assets.

The directors of a company were empowered by the articles of association to create a reserve fund out of the profits of the company for such purposes as they should think conducive to the interests of the company, and to employ the reserve fund in the business of the company without being bound to keep the same separate from the other assets. The company had built up a reserve composed partly of premiums received for leases, partly of premiums received on the issue of preference shares, and partly of ordinary business profits. The reserve was used in the company's business, and was not kept separately invested. The company had incurred a loss arising from the depreciation in the value of its public-houses below the amount stated in the company's balance-sheet. The company accordingly applied for the sanction of the Court to a scheme for reduction of capital whereby the company, while retaining a small portion of the reserve, attributed to the reserve more than its

COMPANY—*continued.*

rateable proportion, and to the capital account less than its rateable proportion, of the loss:—

Held (reversing the decision of Buckley J.), that, the reserve having been properly created out of profits, in ascertaining the amount of capital lost, the loss of assets ought to be treated as rateably apportioned between the reserve and the capital account, and that, in the absence of special circumstances, the company in proposing a scheme for reduction of capital was not bound to wipe out the whole of the reserve, or to attribute to it more than its due proportion of the loss, though it might do so if it chose; and the Court sanctioned the scheme.

The decision of Cozens-Hardy J. in *In re Barrow Hæmatite Steel Co.*, [1900] 2 Ch. 846; [1901] 2 Ch. 746, explained. *In re* HOARE & Co., LIMITED AND REDUCED - - **C. A. 208**

13. —— *Shares—Issue of Shares at a Discount—Issue of Debentures at a Discount—Option to Debenture-holders to take fully paid Shares in Exchange for Debentures.*

A company proposed to issue to its shareholders debentures at a discount of 20 per cent., repayable on November 1, 1909, upon the terms of a circular whereby the registered holder was to have the right at any time prior to May 1, 1909, to exchange his debentures for fully paid shares in the company at the rate of one *l.* fully paid share for every *l.* of the nominal amount of the debentures; and by the conditions of the debentures, in the event of the debenture-holder giving to the company a written demand for shares in exercise of this right, the principal moneys were to become immediately repayable:—

Held (reversing the decision of Buckley J.), that the proposed issue of debentures was void, inasmuch as it was capable of being used as a means of issuing shares at a discount.

Observations of Vaughan Williams L.J. as to paying for shares otherwise than in cash. MOSELY *v.* KOFFYFONTEIN MINES, LIMITED **C. A. 108**

14. —— *Winding-up—Contract to sell Assets—Letters Patent—Omission to assign before Dissolution—Vesting Order—Registration—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 142, 143—*Trustee Act*, 1893 (56 & 57 *Vict. c.* 53), *ss.* 25, 35—*Patents, Designs, and Trade Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *ss.* 23, 87, 90.

The liquidators of a company had agreed to sell to a purchaser letters patent of which the company was the registered owner, but the company was dissolved without any assignment having been executed. The purchaser, who was unable to get himself registered as proprietor of the letters patent, presented a petition asking for an order under s. 35 of the Trustee Act, 1893, vesting them in him:—

Held, that when the company was dissolved the legal interest in the letters patent, if it vested anywhere, vested in the Crown, and that in that case, although the Crown did not act as trustee, it could not be said within s. 35 of the Trustee Act, 1893, that the trustee "could not be found"; if the legal interest did not vest in the Crown there was no trustee, and again it could not be said that the trustee "could not be found,"

COMPANY—*continued.*

because there being no trustee it could not be predicated of him that he "could not be found"; therefore a vesting order could not be made under s. 35.

In re General Accident Assurance Corporation, [1904] 1 Ch. 147, not followed.

Held, further, that a new trustee could not be appointed under s. 25 of the Trustee Act, 1893; and that the consent of the Attorney-General would not give the Court jurisdiction.

Quære, whether the patent had not merged as soon as the legal interest vested in the Crown if it did so vest. *In re* TAYLOR'S AGREEMENT TRUSTS - - - - **Buckley J. 737**

15. —— *Winding-up — Contributory — Forfeited Shares—Right of present Member to Credit for Payment of Calls made before Forfeiture—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 38.

Where a company in pursuance of its articles of association has forfeited shares for non-payment of calls, and the articles provide that notwithstanding forfeiture the ex-shareholder shall be liable to pay the amount of the calls, and the shares are subsequently reallotted to another person, that person is entitled on the winding-up of the company to be credited with all sums paid by the previous holder, whether in respect of moneys paid by him as a shareholder in respect of the shares, or as a debtor in respect of his liability under the articles to pay calls notwithstanding forfeiture. *In re* RANDT GOLD MINING COMPANY - - - **Buckley J. 468**

16. —— *Winding-up—Practice—Appeal from Registrar—Companies (Winding-up) Rules*, 1903, *r.* 7.

An appeal from an order of the registrar in chambers in the winding-up of a company does not lie direct to the Court of Appeal.

The proper course to obtain a reversal of such an order is to move before the judge to discharge it. *In re* PRETORIA PIETERSBURG RAILWAY COMPANY - - - - - **C. A. 170**

17. —— *Winding-up — Practice — Costs, Security for—Misfeasance Summons—Companies (Winding-up) Act*, 1890 (53 & 54 *Vict. c.* 63), *s.* 10.

It is not the practice of the Court to require a liquidator on the ground of poverty to give security for the costs of a misfeasance summons. *In re* STRAND WOOD COMPANY - **C. A. 1**

18. —— *Winding-up—Two Insolvent Companies — Cross-claims — Adjustment — Claim on Debentures—Damages for Misfeasance—Dividend.*

The F. Company and the T. Company were both in liquidation; the F. Company were creditors of the T. Company for 5100*l.* on debentures of the T. Company, and were also debtors to the T. Company for 4323*l.*, the balance of a sum of 12,000*l.*, ordered to be paid to the T. Company for misfeasance. There being no mutual credit, and consequently no set-off of these two debts, the question now raised was how the claim by the F. Company for 5100*l.* against the T. Company was to be adjusted:—

Held, that in distributing the assets of the T. Company the liquidator must treat the balance of the debt due from the F. Company as paid,

COMPANY—*continued.*
and must divide the resulting total assets of the T. Company rateably among all the creditors of the T. Company, including the F. Company, the dividend due to the F. Company being pro tanto retained in respect of the debt due from them, which must thus be satisfied before any dividend on the 5100*l.* could be received by the F. Company. *In re* LEEDS AND HANLEY THEATRES OF VARIETIES, LIMITED - - **Buckley J. 45**

19. —— *Winding-up (Voluntary)—Creditor out of Jurisdiction claiming to prove—Security for Costs — Companies (Winding-up) Rules*, 1903, *r.* 201.

Where a creditor residing out of the jurisdiction applies in a voluntary winding-up for a declaration that he is entitled to prove in the winding-up, the Court has jurisdiction to require him to give security for costs.

And *semble*, that wherever a person out of the jurisdiction comes forward as an actor in a winding-up, whether voluntary, or under supervision, or by the Court, the ordinary practice of the Court as to ordering security for costs applies. *In re* PRETORIA PIETERSBURG RAILWAY COMPANY (No. 2) - - - - **Buckley J. 359**

COMPENSATION — Mines — Reservation of manorial rights—Support—Damage to surface - - - - 419
See INCLOSURE ACT.

"COMPLETION OF WORKS" - - 226
See STREETS. 2.

COMPOUND SETTLEMENT—Deed granting annuities—Settlement by will of grantor's interest in land subject to the annuities
See SETTLED LAND. 3. 460

—— Heirlooms—Sale—Application of proceeds
See SETTLED LAND. 4. 72

CONCEALMENT — Material fact — Statement induced by misrepresentation - 367
See ESTOPPEL.

CONDITION—Fetter on power of sale—Condition of residing and providing a home for third party—Condition or trust 777
See SETTLED LAND. 8.

—— Legacy, Duty of executor to give notice of —Beneficial interest of executor on breach of condition—Estoppel - 656
See EXECUTOR. 1.

—— Sale of goods—Conditions as to resale attached—Notice—Right of purchaser to disregard conditions - - 306
See SALE OF GOODS.

CONSENT—Charity Commissioners—Land transfer—Entry on register with restriction —Royal Charter - - - 252
See CHARITY. 2.

CONTINGENT LEGACY—Infant—Maintenance —Right to surplus income and accumulations - - - - 685
See INFANT.

CONTINGENT REMAINDER—Executory devise or—Remoteness - - - 95
See WILL. 5.

CONTRACT—Building.
See under BUILDING CONTRACT.

—— Incidental to public duty—Poor law guardians—Limitation of time for proceedings - - - - - 449
See PUBLIC AUTHORITIES' PROTECTION.

—— Married woman—Separate estate—Acknowledgment of loan made but not creating debt - - - - - 66
See HUSBAND AND WIFE.

CONTRIBUTION — Mortgage debt — Mortgage insurance policy—Indemnity—Guarantee—Co-suretyship - - 178
See PRINCIPAL AND SURETY.

CONTRIBUTORY — Company — Winding-up — Forfeited shares - - - 468
See COMPANY. 15.

CONVERSION—Postponement of—Interest, Rate of—Wasting property—Income of invested surplus - - - 4
See SETTLED LAND. 5.

CONVEYANCING AND LAW OF PROPERTY—Agent—Scope of authority—Power of attorney—Power to give discharge for mortgage money - - - 219
See PRINCIPAL AND AGENT.

—— Infant — Maintenance — Right to surplus income and accumulations - 685
See INFANT.

—— Settlement—Limited power of appointment —Incapacity of trustee in bankruptcy to release the power - - 348
See POWER OF APPOINTMENT.

COSTS—Repairs—Sanitary works, Cost of—Capital or income - - - 561
See SETTLED LAND. 7.

—— Security for costs—Company—Winding-up (Voluntary)—Creditor out of jurisdiction claiming to prove - - - 359
See COMPANY. 19.

—— Security for costs—Misfeasance summons 1
See COMPANY. 17.

—— Taxation—Creditor in administration action —"Party interested" - - 363
See PRACTICE. 2.

—— Taxation—Divorce—Judicial separation—Implied authority to wife to pledge her husband's credit - - - 665
See PRACTICE. 1.

—— Third party, Taxation by—Taxation of bill of mortgagee's solicitor on application of mortgagor - - 152
See SOLICITOR.

—— Trustee, Solicitor—Breach of trust—Delay in accounting—Liability to indemnify co-trustee - - - - 785
See TRUSTEE.

CO-SURETYSHIP — Mortgage debt — Mortgage insurance policy—Indemnity—Guarantee—Contribution - - - 178
See PRINCIPAL AND SURETY. 11.

COUNTY COURT — Jurisdiction — Lease — Disclaimer — Mortgagees by demise — Option to take vesting order or be excluded - - - - 57
See BANKRUPTCY.

COVENANT — Negative covenant, Right of assignee to enforce—Indemnity - 376
See LANDLORD AND TENANT.

—— Restrictive covenants, Freeholds subject to —Covenants to be entered into by purchaser - - - - 173
See VENDOR AND PURCHASER. 1.

CREDITOR—Costs—Taxation—Creditor in administration action—"Party interested"
See PRACTICE. 2. 363

—— Costs, Security for—Creditor out of jurisdiction claiming to prove - - 359
See COMPANY. 19.

CUSTOM—*Fishing Nets, Custom to dry—Validity —Changes in User—Encroachment and Recession of Sea—Accretion—Land added by Accretion subject to Custom—Evidence—Public Documents —Ancient Reports to Government Departments— Depositions—Maps and Charts.*

A custom for fishermen to spread their nets to dry on the land of a private owner at all times seasonable for fishing is a good and valid custom. Such a custom may be established by evidence of user though the periods of user, and the number and character of the nets dried, may have varied from time to time.

Where the sea has gradually receded, land added by accretion takes the character of, and becomes subject to the same customs as, the land to which it is added.

In order to be admissible in evidence as a public document, a document must be made for the purpose of the public making use of it and of being kept public so that the persons concerned may have access to it. Reports made to a department of the Government, and maps or plans made for the use of the department, are not admissible as public documents. Depositions made in an action where public rights are in question are admissible against strangers in any case where evidence of reputation is admissible, but only if they speak to reputation, not if they merely state particular facts. Charts prepared by persons employed by the Admiralty for the use of the navy and merchants are admissible in evidence, but a chart prepared by a private person is not admissible merely because it comes from the custody of the Admiralty. MERCER *v.* DENNE - - - - Farwell J. 534

DAMAGE — Mines — Reservation of manorial rights—Support—Damage to surface—Compensation - - - 419
See INCLOSURE ACT.

DAMAGES — Building contract — Architect — Certificate—Defective work and materials - - - - - 261
See BUILDING CONTRACT.

—— Misfeasance—Winding-up—Two insolvent companies—Cross-claims — Adjustment —Claim on debentures—Dividend 45
See COMPANY. 18.

—— Patent and registered design for same invention — Estoppel — Liability in damages - - - - 580
See DESIGN.

DEBENTURES—Company—Law.
See under COMPANY.

DEFEASANCE CLAUSE—Bequest of heirlooms to devolve with real estate—Gift over—"Of" read for "or" - - 496
See WILL. 1.

DELAY—Breach of trust—Negligence—Delay in accounting—Solicitor trustee—Liability to indemnify co-trustee - 785
See TRUSTEE.

DEPOSIT—Executor—Retainer—Debt—Ready money—Money on deposit - 66
See HUSBAND AND WIFE.

DEPOSITIONS—Evidence—Public documents—Ancient reports to Government departments—Maps and charts - - 534
See CUSTOM.

DESIGN — *Registration — Infringement —Patent and Registered Design for same Invention— Estoppel—Infringement in Ignorance of Registration—Liability in Damages—Defence of Want of Novelty—Application to vacate Registration— Patents, Designs, and Trade Marks Act,* 1883 (46 & 47 *Vict. c.* 57), *ss.* 13, 47, 51, 58, 59, 60, 61, 90.

On November 8, 1901, the plaintiffs applied for a patent for improvements in frames for motor cycles, and delivered a provisional specification. On November 18, 1901, the plaintiffs obtained registration of a design for motor cycles. On August 8, 1902, the plaintiffs delivered a complete specification for the patent, which was accepted on October 23, 1902, and the patent was afterwards granted bearing date November 8, 1901. The complete specification contained a drawing identical with the registered design. In an action by the plaintiffs to restrain the infringement of the design:—

Held, that the validity of the registration of the design was not affected by the subsequent grant of the patent of prior date.

Until the service of the writ in the action the defendants were ignorant of the registration of the plaintiffs' design, but after service of the writ the defendants sold some machines made according to the registered design, and claimed the right to do so, alleging that the registration was invalid, though upon an application for an interlocutory injunction they offered to keep an account:—

Held, that the plaintiffs were entitled to an injunction, but that they could not recover damages in respect of sales made by the defendants before the writ.

Decision of Byrne J., [1904] 1 Ch. 264, affirmed.

Whether in an action to restrain the infringement of a registered design the defence of want of novelty can be maintained in the absence of an application to vacate the registration, *quære.*

Per Vaughan Williams L.J.: A patent right in an article and a copyright in a design for the same article may co-exist, but the registration of a design which secures mechanical advantages may, as an anticipation, prevent the grant of a subsequent valid patent for the article, and that whether the applicant for the patent be the proprietor of the design or a stranger.

DESIGN—*continued.*

A patentee, who registers a design for an article after he has applied for a patent for it, and before the delivery of a complete specification containing a drawing of the article identical with the registered design, is not, by the subsequent grant of a patent bearing the date of his application, estopped from saying that the design was new and original at the date of registration.

Per Romer L.J.: In most cases it will be very difficult for a patent right in respect of a new article and a copyright in a registered design for the shape of the article to co-exist.

But in such circumstances as those of the present case the two rights, being not necessarily the same, might co-exist, though the right which was second in point of date must be held subject to the first right. The grant of the patent in such a case does not destroy the effect of the registration of the design which was valid at the date when it took place, and this whether the owner of the patent and the owner of the design are the same person or different persons. WERNER MOTORS, LIMITED *v.* A. W. GAMAGE, LIMITED - - - - C. A. 580

DIRECTOR—Debentures—Ultra vires—Borrowing powers—Knowledge of director of lending company of intended misapplication—Implied notice - - 608
See COMPANY. 5.

—— Prospectus—Non-disclosure of contracts—Directors' liability—"Knowingly issuing" - - - - 631, 732
See COMPANY. 8, 9.

DISCLAIMER—Lease—Mortgagees by demise—Option to take vesting order or be excluded—County court—Jurisdiction
See BANKRUPTCY. 57

—— Retainer—Insolvent estate—Executor of sole trustee—Disclaimer of trust 774
See EXECUTOR. 2.

DISCOUNT—Issue of debentures at a—Option to debenture-holders to take fully paid shares in exchange for debentures 108
See COMPANY. 13.

DISCRETION—Improvements—Scheme approved by trustees—Discretion of Court - 22
See SETTLED LAND. 2.

DISTRIBUTION — Scheme for — Unexpended funds—Unregistered friendly society—Insolvency of society—Jurisdiction to wind up - - - - 196
See BENEFIT SOCIETY.

DIVIDEND—Gas company—Income tax, Payment of dividend free of - - 621
See REVENUE. 3.

—— Winding-up—Two insolvent companies—Cross-claims—Adjustment—Claim on debentures—Damages for misfeasance
See COMPANY. 18. 45

DIVORCE—Costs—Taxation—Judicial separation—Implied authority to wife to pledge her husband's credit - 665
See PRACTICE. 1.

DOCUMENTS—Evidence—Public documents—Ancient reports to Government departments—Depositions—Maps and charts
See CUSTOM. 534

EASEMENT—Lease—Principal mansion-house—"Park"—Easement over mansion-house—Invalidity of agreement - 503
See SETTLED LAND. 6.

—— Necessity, Easement of—Grant of one of two adjoining tenements—Derogation from grant—Implied reservation - 17
See LIGHT AND AIR.

ECCLESIASTICAL LAW — Advowson — Charitable trust—Trust to appoint a fit and duly qualified person - - 643
See CHARITY. 1.

EDUCATION—Charitable legacy—School—Endowment—Trust deed—Forfeiture—Gift over to residue—Perpetuities 767
See WILL. 3.

—— Committee—Scheme—Retirement of members—Jurisdiction of council to alter dates - - - - 481
See LOCAL GOVERNMENT. 1.

—— School board—Transfer of property—Vesting—Consols - - - 716
See LOCAL GOVERNMENT. 2.

EQUITABLE ESTATE IN FEE—Conveyance to trustees—Omission of words of limitation - - - - - 752
See SETTLEMENT. 1.

EQUITABLE EXECUTION—Receiver, Appointment of—Notice to vendor—Rescission of contract by consent—Secured creditor
See VENDOR AND PURCHASER. 2. 93

ESTATE DUTY—Direction to pay "my duties" out of residue - - - 345
See WILL. 6.

—— Direction to pay out of specific fund 781
See REVENUE. 1.

—— Succession duty—Settlement by Act of Parliament—Restriction against alienation—Power of sale - - 289
See REVENUE. 2.

ESTOPPEL—*Statement induced by Misrepresentation—Concealment of Material Fact.*

A person cannot rely by way of estoppel on a statement induced by his own misrepresentation, or by his concealment of a material fact the disclosure of which would have been calculated to make his informant hesitate or seek for further information before making the statement, or where the circumstances would have deterred a reasonable man from acting on it.

Intending mortgagees of a trust fund induced a trustee to sign a memorandum that he had not received any notice of a prior charge, without informing him that the particular form of memorandum had been submitted to and was still under the consideration of his solicitors, whose practice was to refuse to advise trustees to sign such documents, and also, though perhaps unintentionally, giving him the impression that he was signing it with their approval.

The mortgagees were definitely informed

ESTOPPEL—*continued.*
before completion that the solicitors never advised trustees to sign the particular form of memorandum.

Some time after completion it was discovered that the trustee had received and forgotten a notice of a prior charge:—

Held, that the mortgagees could not rely on the memorandum by way of estoppel.

George Whitechurch, Ld. v. *Cavanagh*, [1902] A. C. 117, 145, and *Low* v. *Bouverie*, [1891] 3 Ch. 82, 113, applied. PORTER *v.* MOORE
Swinfen Eady J. 367

—— Legacy, Duty of executor to give notice of —Beneficial interest of executor on breach of condition - - 656
See EXECUTOR. 1.

—— Patent and registered design for same invention—Infringement in ignorance of registration - - - 580
See DESIGN.

EVIDENCE—Field-book entries—Deceased surveyor—Professional duty - - 525
See SEASHORE.

—— Public documents—Ancient reports to Government departments—Depositions—Maps and charts - - - 534
See CUSTOM.

EXECUTION—Equitable—Receiver, Appointment of—Notice to vendor—Rescission of contract by consent—Secured creditor
See VENDOR AND PURCHASER. 2. 93

EXECUTOR—*Legatee—Duty of Executor to give Notice of Legacy—Conditional Gift—Beneficial Interest of Executor on Breach of Condition—Estoppel.*

Where a legacy is given upon a condition, an executor who takes a beneficial interest in the legacy on the breach of the condition owes no duty to the legatee to give notice of the terms of the legacy.

Dictum of Lord Hardwicke in *Chauncy* v. *Graydon*, (1743) 2 Atk. 616, 619, considered.

A testatrix appointed her son A. her executor and bequeathed a leasehold house to her son B., then abroad, and directed that in case he should not return and claim it it should go to A. After the death of the testatrix, A. wrote to B.: "A house has been left you and according to the will it is to be in my hands until you claim it"; but he did not inform him of the gift over. B. died abroad without having claimed the house:—

Held (affirming Joyce J.), that A. was not estopped by the letter from claiming under the gift over, because (1) there was no sufficiently precise representation that B. was absolutely entitled: (2) it was not proved that the non-return of B. was the consequence of the representation. *In re* LEWIS. LEWIS *v.* LEWIS
C. A. 656

2. —— *Retainer—Insolvent Estate—Executor of Sole Trustee—Disclaimer of Trust—Exercise of Right of Retainer for Benefit of Trust Estate.*

The sole trustee of a fund misappropriated it and died insolvent. His executor had never

EXECUTOR—*continued.*
acted in the trust, and desired to be discharged therefrom:—

Held, that he was entitled to decline to act in the trust, and was not bound to exercise his right of retainer for the benefit of the cestuis que trust in respect of the debt due to him as trustee of the fund. *In re* RIDLEY. RIDLEY *v.* RIDLEY
Joyce J. 774

—— Notice to executor—Renunciation by executor—Charges on expectancy—Priority—Assignor executor - - - 385
See MORTGAGE.

—— Retainer—Debt—Ready money—Money on deposit - - - - 66
See HUSBAND AND WIFE.

EXECUTORY DEVISE—Contingent remainder or—Remoteness - - - 95
See WILL. 5.

FALSA DEMONSTRATIO—Conveyance of land bounded by seashore—Parcels—Plan—Dimensions—Boundary line - 525
See SEASHORE.

FIELD-BOOK ENTRIES—Evidence—Deceased surveyor—Professional duty - 525
See SEASHORE. 1.

FINANCE ACTS.
See under REVENUE.

FISHING NETS—Custom to dry—Changes in user—Encroachment and recession of sea—Accretion - - - 534
See CUSTOM.

FORESHORE—Public right of bathing - 313
See SEASHORE.

FORFEITURE—Charitable legacy—School—Endowment—Trust deed—Gift over to residue—Perpetuities - - 767
See WILL. 3.

—— Company—Winding-up—Contributory—Forfeited shares - - - 468
See COMPANY. 15.

FRAUDS, STATUTE OF—Specific performance—Part performance - - - 339
See VENDOR AND PURCHASER. 3.

FRIENDLY SOCIETY—Unregistered—Insolvency of society—Jurisdiction to wind up - - - - - 196
See BENEFIT SOCIETY.

GAS COMPANY—Income tax—Standard rate of dividend—Payment of dividend free of income tax - - - - 621
See REVENUE. 3.

GRANT—Easement of necessity—Derogation from grant—Implied reservation - 17
See LIGHT AND AIR.

GUARANTEE—Mortgage debt—Mortgage insurance policy—Indemnity—Guarantee—Co-suretyship—Contribution - 178
See PRINCIPAL AND SURETY.

GUARDIANS OF THE POOR.
See under POOR LAW.

HEIRLOOMS—Bequest of, to devolve with real estate—Defeasance clause—Gift over
See WILL. 1. 496

—— Sale—Application of proceeds—Compound settlement 72
See SETTLED LAND. 4.

HIGHWAY—Approaches—Liability to repair 300 feet from end of bridge - 513
See BRIDGES.

HUSBAND AND WIFE — *Married Woman*—*Separate Estate—Contract—Acknowledgment of Loan made but not creating Debt — Married Women's Property Act*, 1893 (56 & 57 *Vict. c.* 63), *s.* 1—*Executor—Retainer—Debt—Ready Money—Money on Deposit.*

Under s. 1 of the Married Women's Property Act, 1893, in order to bind the separate estate of a married woman there must be a contract by her entered into after the passing of the Act, and then entered into for the first time. An acknowledgment since the Act of the fact that the married woman had had moneys advanced to her prior to the Act, but for which she was under no liability, having had no separate estate at the time of the advance, even if the acknowledgment is in such terms as would make a debt recoverable though barred by the Statute of Limitations, is not sufficient to render her liable to repay such advances.

The right of an executor to retain or set off the share of one of the next of kin in the estate under a partial intestacy against a debt owing by him to the estate, notwithstanding that it is barred by the Statute of Limitations, depends upon whether there was due from the legatee a debt for which but for the Statute of Limitations he could have been sued.

Money on deposit at a bank withdrawable at fourteen days' notice is not ready money.

Mayne v. *Mayne*, [1897] 1 I. R. 324, followed.
In re WHEELER. HANKINSON *v.* HAYTER
Warrington J. 66

—— Implied authority to wife to pledge her husband's credit - - - 665
See PRACTICE. 1.

IMPROVEMENTS — Capital moneys — Scheme approved by trustees — Discretion of Court - - - - 22
See SETTLED LAND. 2.

INCLOSURE ACT — *Construction of — Mines—Reservation of Manorial Rights — Support — Damage to Surface—Compensation.*

The plaintiffs were owners of the surface of freehold lands allotted to them by an Inclosure Act of 1757 relating to waste lands of a manor; the defendants were lessees from the successors in title of the lord of the manor at the date of the Act of mines under these same lands; the question for decision was whether on the construction of the clauses in the Inclosure Act authorizing the lord to search for, work, and carry away the coal and minerals under the inclosed lands as fully and freely as he might have done had this Act not been passed, without making or paying any satisfaction for so doing, the defendants were entitled to let down and

INCLOSURE ACT—*continued.*

destroy the plaintiffs' lands. There was a compensation clause in the Act providing that any damage done by the exercise of the powers reserved to the lord should be paid for by an assessment upon the occupiers of the other allotments:—

Held (affirming the decision of Farwell J.), that the Act, construed as a whole, did not clearly take away from the surface owners their common law right to support, and that the plaintiffs were entitled to an injunction.

The general principles applicable to the construction of Inclosure Acts collected and stated by Farwell J.; and per Lord Davey in *New Sharlston Collieries Co.* v. *Earl of Westmorland*, [1904] 2 Ch. 443, n. The question of right to support is one of construction in each case, and the same principles apply whether the instrument be a grant, lease, or Inclosure Act.

The decision in *Consett Waterworks Co.* v. *Ritson*, (1889) 22 Q. B. D. 318 and 702; 64 L. J. (Ch.) 293, n., is not of authority beyond the special provisions of the Act which the Court had then to construe. BISHOP AUCKLAND INDUSTRIAL CO-OPERATIVE SOCIETY, LIMITED *v.* BUTTERKNOWLE COLLIERY COMPANY, LIMITED **C. A. 419**

2. —— *Construction of Inclosure Act—Mines—Support—Damage to Surface.*

The mere fact of giving a right to sink pits and to work or get coal does not of itself establish a right to get rid of the common law right of the surface owner to have his surface undisturbed.

The question of right to support is one of construction in each case, and the same principles apply whether the instrument be a grant, lease, or Inclosure Act. NEW SHARLSTON COLLIERIES CO. *v.* WESTMORLAND (EARL OF)
(1900) H. L. (E.) [1904] 2 Ch. 443, n.

INCOME—Capital or—Repairs—Sanitary works, Cost of - - - - 561
See SETTLED LAND. 7.

INCOME TAX.
See under REVENUE.

INDEMNITY—Covenants to be entered into by purchaser—Freeholds subject to restrictive covenants - - - 173
See VENDOR AND PURCHASER. 1.

—— Lease, Assignment of—Negative covenant, Right of assignee to enforce - 376
See LANDLORD AND TENANT.

—— Mortgage debt—Mortgage insurance policy Guarantee — Co-suretyship — Contribution - - - - - 178
See PRINCIPAL AND SURETY.

—— Solicitor trustee—Breach of trust—Delay in accounting—Liability to indemnify co-trustee - - - - 785
See TRUSTEE.

INFANT—*Maintenance—Contingent Legacy by Father to Child — Contingent Life Interest — Settled Legacy—Right to Surplus Income and Accumulations—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 43, *sub-s.* 2.

A testator by his will, dated June 17, 1898, bequeathed to each of his daughters who should

INFANT—*continued.*
attain twenty-one the sum of 50,000*l.*; provided that the legacy should not vest absolutely in her, but should be retained by his trustees and held by them upon trust to pay the income to the daughter for her life, and after her death upon trusts for her children and remoter issue. And the testator authorized his trustees to appropriate any part of his personal estate in or towards satisfaction of any legacy given by his will. And he directed that immediately after his death his trustees should take such steps as should be requisite to make his children who were then under twenty-one wards of Court, and that "notwithstanding anything hereinbefore contained, all powers, whether statutory or otherwise, as to the education, maintenance, or advancement" of his children or any of them should be exercised by his trustees only under the direction of the Court.

The testator died on November 4, 1902. He left four daughters, all of whom were at his death under twenty-one. On January 6, 1903, the trustees appropriated in satisfaction of each of the legacies of 50,000*l.* a sum of 53,547*l.* 10*s.* 6*d.* Consols. On February 9, 1903, an order was made by Joyce J. that a sum of 1000*l.* per annum should be allowed out of the income of the Consols appropriated to the legacy of the eldest daughter for her maintenance during her minority. She attained twenty-one on July 13, 1903.

Upon a summons taken out by the trustees to determine who was then entitled to the unapplied income and the accumulations thereof:—

Held, that the unapplied income and the accumulations thereof formed an accretion to the capital, and that the daughter was entitled only to the interest on them for her life.

Decision of Joyce J., founded on that of Buckley J., in *In re Scott*, [1902] 1 Ch. 918, reversed.

In re Scott disapproved.

Sect. 43, sub-s. 2, of the Conveyancing Act, 1881, provides that the trustees of property held in trust for an infant contingently on his attaining twenty-one shall hold the accumulations of the residue of the income (beyond that which is applied for the infant's maintenance) "for the benefit of the person who ultimately becomes entitled to the property from which the same arise":—

Held, that those words mean "the property the income arising from which has been accumulated," so that if the contingent legacy is settled the tenant for life is, on the happening of the contingency, entitled only to the interest during his life of the amount of the surplus income and accumulations thereof, that amount forming an accretion to the original legacy.

According to the practice of the Court of Chancery, an infant child, who is under the will of his parent entitled to a legacy contingently on his attaining twenty-one, is entitled to maintenance during his minority out of the income of the legacy.

But, though it has been said that the legacy in such a case bears interest from the testator's death, the legacy is not the less a contingent one, and the infant does not acquire an immediate vested interest in the income, and if he dies under twenty-one the surplus income not applied for maintenance does not pass to the infant's representatives.

And if the legacy is settled in trust for the infant for life, with remainders over, the surplus income forms an accretion to the capital, and the infant on attaining twenty-one is entitled only to the income thereof during his life.

Per Cozens-Hardy L.J.: Until a fund has been appropriated by the trustees in satisfaction of the contingent legacy, s. 43, sub-s. 2, had strictly no application, because until then it could not be said that any "property" was held by the trustees in trust for the infant legatee, though she was entitled to maintenance out of the income during minority. *In re* Bowlby. Bowlby *v.* Bowlby - - - **C. A. 685**

—— Maintenance, Expenses of—Arrears—Right of poor law guardians to recover against property of infant - - - **465**
See Poor Law.

INFRINGEMENT—Patent.
See under Patent.

INHERITANCE — No words of—Real estate—Limitations—Equitable estate in fee
See Settlement. 2. **487**

INJUNCTION—Street—Infringement of building line — Penalty—Subsequent action by Attorney-General for injunction — Laches - - - - **34**
See Streets. 1.

INSOLVENCY—Unregistered friendly society—Jurisdiction to wind up - - **196**
See Benefit Society.

INSURANCE — Mortgage debt — Mortgage insurance policy—Indemnity—Guarantee —Co-suretyship—Contribution - **178**
See Principal and Surety.

INTEREST—Wasting property—Mining royalties—Rate of interest—Income of invested surplus - - - - **4**
See Settled Land. 5.

JOINTURING—Power of—Restriction against alienation—Power of sale—Settled land
See Revenue. 2. **289**

JUDGMENT—Notice of—Service—Unregistered friendly society—Jurisdiction to wind up - - - - - **196**
See Benefit Society.

—— Purchaser, Judgment creditor of—Appointment of receiver—Notice to vendor—Rescission of contract by consent **93**
See Vendor and Purchaser. 2.

JUDICIAL SEPARATION — Costs — Taxation—Divorce—Implied authority to wife to pledge her husband's credit - **665**
See Practice. 1.

JURISDICTION — Company — Winding-up — (Voluntary)—Creditor out of jurisdiction claiming to prove - - **359**
See Company. 19.

JURISDICTION—*continued.*

—— County court—Lease—Disclaimer—Mortgagees by demise—Option to take vesting order or be excluded - - 57
See BANKRUPTCY.

—— Friendly society, Unregistered—Insolvency of society—Jurisdiction to wind up 196
See BENEFIT SOCIETY.

—— Practice—Pleadings—Ouster of jurisdiction, Omission to plead—Trial of action—Amendment - - - 123
See COMPANY. 7.

LACHES—Street—Infringement of building line—Penalty—Conviction—Subsequent action by Attorney-General for injunction - - - - - - 34
See STREETS. 1.

LAND TRANSFER—Consent of Charity Commissioners to sale of charity lands—Entry on register with restriction—Royal Charter - - - 252
See CHARITY. 2.

LAND TRANSFER RULES, 1903, rr. 29, 83, Sched. I., Form 13 - - - 252
See CHARITY. 2.

LANDLORD AND TENANT—*Covenants, Negative—Alterations—Assignment of Lease—Lessor and Lessee—Covenant "to perform and observe" original Covenants—Right of Assignee to enforce Negative Covenant—Indemnity.*

The true object of the covenant by the assignee usually inserted in an assignment of leaseholds is merely to indemnify and protect the lessee against breach of covenants contained in the lease, and consequently a lessee is not entitled to enforce by injunction the specific performance by his assignee of the negative covenants contained in the original lease by means of the covenant "to perform and observe" the covenants and conditions contained in the lease, and to indemnify the assignor from and against all claims and demands on account of the same.

Observations in *In re Poole and Clarke's Contract*, [1904] 2 Ch. 173, discussed and applied.

Semble: A covenant to perform and observe the negative covenants in a lease is not of itself a negative covenant within the rule which binds the Court to grant an injunction on evidence of its breach. HARRIS *v.* BOOTS, CASH CHEMISTS (SOUTHERN), LIMITED - **Warrington J. 376**

—— Lease—Disclaimer—Mortgagees by demise—Option to take vesting order or be excluded—County court—Jurisdiction 57
See BANKRUPTCY.

LAPSE—Ambiguity—Explanation by reference to recital in codicil—Gift to a class 52
See WILL. 2.

—— Gift with intention of discharging obligation—Death of legatee - - 30
See WILL. 4.

LEASE.
See under LANDLORD AND TENANT.

LEASE—*continued*

—— Settled Land Acts—Principal mansion-house—"Park"—"Usually occupied therewith"—Easement over mansion-house—Invalidity of agreement - 503
See SETTLED LAND ACT. 6.

LEGACY.
See under WILL.

—— Duty of executor to give notice of—Beneficial interest of executor on breach of condition—Estoppel - - 656
See EXECUTOR. 1.

LETTERS PATENT.
See under PATENT.

LIEN—Payment of deposit—Purchaser's interest in land—Equitable execution—Appointment of receiver - - 93
See VENDOR AND PURCHASER. 2.

LIGHT AND AIR — *Necessity, Easement of—Light—Grant of one of two adjoining Tenements—Derogation from Grant—Implied Reservation.*

The defendant, being the owner of two adjoining tenements, granted one of them to the plaintiff's predecessor in title, while retaining the other, without expressly reserving to himself any rights over the tenement granted. The plaintiff built a wall on her premises so as to block out the light to two windows in the defendant's premises. One of these windows lighted a pantry which could not be lighted in any other way except by means of borrowed light, and the obstruction rendered the pantry useless as a pantry:—

Held, that there was no implied reservation to the defendant of the right to the access of light to the pantry window, inasmuch as it was not an easement of necessity within the exception to the rule in *Wheeldon* v. *Burrows*, (1879) 12 Ch. D. 31.

The principle of *Union Lighterage Co.* v. *London Graving Dock Co.*, [1902] 2 Ch. 557, applied. RAY *v.* HAZELDINE - **Kekewich J. 17**

LIMITATION—Omission of words of—Equitable estate in fee—Conveyance to trustees
See SETTLEMENT. 1. 752

—— Public authority—Limitation of time for proceedings—Poor law guardians 449
See PUBLIC AUTHORITIES' PROTECTION.

—— Real estate—Equitable estate in fee—No words of inheritance - - 487
See SETTLEMENT. 2.

LIMITATION, STATUTES OF—*Principal and Agent—Moneys remitted to Agent for Special Purpose—Action for Account—Express Trust.*

Decision of Kekewich J., [1904] 1 Ch. 242, affirmed. NORTH AMERICAN LAND AND TIMBER COMPANY *v.* WATKINS - - **C. A. 233**

LOCAL GOVERNMENT—*Education—Committee—Scheme—Retirement of Members—Jurisdiction of Council to alter Dates—Education Act*, 1902 (2 *Edw.* 7, *c.* 42), *s.* 17, *sub-s.* 1; *s.* 21, *sub-s.* 3.

By the scheme for the constitution of the education committee of the Barry Urban District Council, approved by the Board of Education on April 16, 1903, it was provided that the com-

LOCAL GOVERNMENT—*continued.*

mittee should consist of nine members, that the members of it should hold office for a period of three years, provided nevertheless that one-third should go out of office on May 1 in the year 1904 and in each succeeding year, and that "The council shall determine the order in which they shall retire." On April 20, 1903, the council passed resolutions under which the plaintiff was to be a member of the committee and retire at the end of the second year. On April 18, 1904, the council, purporting to act under their standing orders, passed a resolution rescinding so much of the resolution of April 20, 1903, as decided that the plaintiff should retire at the end of the second year, namely on May 1, 1905, and directing that in lieu thereof he should retire on May 1, 1904:—

Held, that the council had power to make a final scheme and determine the method of retirement; that when they had once fixed the dates of retirement they could not alter them without a new scheme; and that the resolution of April 18, 1904, was ultra vires. MILWARD *v.* BARRY URBAN DISTRICT COUNCIL - - **Buckley J. 481**

2. —— *Education—School Board — Borough Council—Appointed Day—Transfer of Property —Vesting — Consols — National Debt Act*, 1870 (33 & 34 *Vict. c.* 71), *s.* 22—*Elementary Education Act*, 1870 (33 & 34 *Vict. c.* 75), *s.* 30—*National Debt (Stockholders' Relief) Act*, 1892 (55 & 56 *Vict. c.* 39), *s.* 4—*Education Act*, 1902 (2 *Edw.* 7, *c.* 42), *ss.* 5, 25; *Sched.* 2, *clause* 1.

This was an action brought by the corporation of Oldham against the Bank of England to obtain possession of 780*l.* 0*s.* 2*d.* 2½ per cent. Annuities. The plaintiffs by their council were, under the Education Act, 1902, the local education authority for the district of the borough of Oldham. The Act came into operation in that district on January 1, 1904, which was the "appointed day," and at that time these Annuities stood in the books of the Bank of England in the name of the Oldham School Board. The plaintiffs claimed that on the appointed day the school board had ceased to exist, that the 780*l.* 0*s.* 2*d.* had then become vested in them by virtue of the Act, and that no further transfer was necessary. The bank contended that the Annuities could only be transferred by an entry in their books, that the Oldham School Board had not been dissolved, that the Annuities must be transferred by them to the plaintiffs, and that the Annuities had not been vested in the plaintiffs by virtue of the Act:—

Held (reversing the decision of Farwell J.), that by s. 5 of the Act of 1902 the school board had for all purposes ceased to exist on the appointed day; that by sched. 2, clause 1, to the Act the Annuities had on that day vested in the plaintiffs by virtue of the Act; and that no further transfer was necessary. OLDHAM CORPORATION *v.* BANK OF ENGLAND - **C. A. 716**

—— Paving expenses—"Completion of works" —Vendor and purchaser—Outgoings
See STREETS. 2. 226

—— Streets.
See under STREETS.

LONDON—Sanitary works, Cost of—Repairs—Capital or income - - - - 561
See SETTLED LAND. 7.

LOSS — Apportionment — Settled fund—Authorized investment—Mortgage—Deficient security - - - - - 160
See SETTLED LAND. 1.

LUNACY—*Power of Appointment among Children —Lunatic — Committee — Powers exercisable by Committee under Order of Judge—Power vested in Lunatic "in the Character of Trustee"—Lunacy Act*, 1890 (53 & 54 *Vict. c.* 5), *ss.* 116, 128.

Where a marriage settlement conferred on the husband and wife a joint power of appointment by deed among the children of the marriage, and the wife afterwards became a lunatic not so found:—

Held (Cozens-Hardy L.J. dissenting), that the Judge in Lunacy under s. 128 of the Lunacy Act, 1890, had jurisdiction to authorize the person appointed under s. 116 to exercise the powers of a committee of the estate to concur on behalf of the alleged lunatic in exercising the joint power of appointment as being a power vested in the alleged lunatic "in the character of trustee." *In re* A. (A PERSON OF UNSOUND MIND NOT SO FOUND BY INQUISITION) **C. A. 328**

—— Settlement—Limited power of appointment —Bankruptcy of donee of power—Incapacity of trustee in bankruptcy to release the power - - - - 348
See POWER OF APPOINTMENT.

MAINTENANCE — Infant — Right to surplus income and accumulations - - 685
See INFANT.

—— Infant, Right of poor law guardians to recover against property of—Arrears 465
See POOR LAW.

MANDATORY ORDER—To pull down—Street — Infringement of building line — Penalty—Conviction - - - - 34
See STREETS. 1.

MANOR — Mines — Reservation of manorial rights—Support—Damage to surface—Compensation - - - - 419
See INCLOSURE ACT.

MANSION-HOUSE —"Park" — "Usually occupied therewith"—Easement over mansion-house" - - - - 503
See SETTLED LAND. 6.

MAPS—Evidence—Charts—Public documents—Ancient reports to Government departments—Depositions - - - 534
See CUSTOM.

MARRIED WOMAN.
See under HUSBAND AND WIFE.

MATRIMONIAL CAUSES — Costs — Taxation—Divorce—Judicial separation - 665
See PRACTICE. 1.

MEMORANDUM OF ASSOCIATION—Company.
See under COMPANY.

MERGER—Lease—Question of merger—Intention—Evidence - - - 57
See BANKRUPTCY.

MINES — Reservation of manorial rights — Support — Damage to surface — Compensation - - - - 419
See INCLOSURE ACT.

—— Royalties, Mining — Wasting property — Interest, Rate of—Income of invested surplus - - - - - 4
See SETTLED LAND. 5.

MISFEASANCE — Costs, Security for — Misfeasance summons - - - 1
See COMPANY. 17.

—— Damages for—Winding-up—Two insolvent companies — Cross-claims — Adjustment —Claim on debentures—Dividend 45
See COMPANY. 18.

MISREPRESENTATION—Statement induced by —Concealment of material fact - 367
See ESTOPPEL.

MORTGAGE — *Notice — Incumbrances— Personal Estate—Charges on Expectancy—Notice—Priority —Assignor Executor—Renunciation by Executor —Notice to Executor—Notice to Person having Legal Dominion of Fund—Fund without Trustee —Administrator, Subsequent Notice to.*

In 1897 D. charged his expectant interest in a legacy bequeathed to him by the will of his father, who was then living, in favour of S., and in 1898 he charged it in favour of B. The father died in 1902, D. being named his sole executor. In January, 1903, D., who had never acted as executor, renounced probate, and on March 4 administration, with the will annexed, was granted to his sister. On the following day B. gave notice to the administratrix of his charge. On March 12 S., who then became aware for the first time of the grant of administration, gave the administratrix notice of his charge. Subsequently the legacy, which had been in Court, was paid out to the administratrix:—

Held, by the Court of Appeal, that, although S.'s delay in giving notice to the administratrix was not due to any negligence on his part, yet, applying the rule in *Dearle* v. *Hall*, (1828) 3 Russ. 1; 27 R. R. 1, recognised in *Ward* v. *Duncombe*, [1893] A. C. 369, B. was entitled to priority through his having been the first to give notice to the administratrix as being the first person having legal dominion of the fund after it had come into existence by the death of the testator:

Held, further, that the case was governed by *Johnstone* v. *Cox*, (1880) 16 Ch. D. 571; (1881) 19 Ch. D. 17, and that the circumstance that on the death of the testator, when the fund charged came into existence, there was no trustee or other person having the legal dominion of the fund to whom effective notice could be given, was immaterial to alter the priority obtained by notice given to the person who subsequently had such legal dominion.

Notice given by an assignee of a fund to the person who is himself the assignor is not an effectual notice so as to alter priorities: *Browne* v. *Savage*, (1859) 4 Drew. 635.

Semble, notice given by an incumbrancer to an executor who afterwards renounces without having in any way acted in the office is invalid.

Decision of Buckley J. affirmed. *In re* DALLAS - - - - C. A. 385

MORTGAGE—*continued.*

—— Agent — Scope of authority — Power of attorney—Power to sell property belonging to principal - - - 219
See PRINCIPAL AND AGENT.

—— Costs—Taxation by third party—Taxation of bill of mortgagee's solicitor on application of mortgagor - - - 152
See SOLICITOR.

—— Insurance policy—Mortgage debt—Indemnity — Guarantee — Company — Suretyship—Contribution - - 178
See PRINCIPAL AND SURETY.

—— Lease—Disclaimer—Mortgagees by demise —Option to take vesting order or be excluded—County court—Jurisdiction.
See BANKRUPTCY. 57

—— Tenant for life and remainderman—Authorized investment—Deficient security—Loss—Apportionment - - 160
See SETTLED LAND. 1.

NATIONAL DEBT—School board—Transfer of property—Vesting—Consols - 716
See LOCAL GOVERNMENT. 2.

NECESSITY — Easement of — Derogation from grant—Implied reservation - 17
See LIGHT AND AIR.

NEGATIVE COVENANT—Right of assignee to enforce—Indemnity - - 376
See LANDLORD AND TENANT.

NETS—Custom to dry fishing nets—Changes in user — Encroachment and recession of sea—Accretion - - - 534
See CUSTOM.

NEW RIVER COMPANY—Approaches—Highway—Liability to repair 300 feet from end of bridge - - - 513
See BRIDGES.

NOTICE — Charges on expectancy — Priority—Assignor executor — Renunciation by executor—Notice to executor - 385
See MORTGAGE.

—— Company—Borrowing powers—Ultra vires —Knowledge of director of lending company of intended misapplication — Implied notice - - - 608
See COMPANY. 5.

—— Company—Debentures—Registered holder —Equities of company against transferor — Rights of transferee for value without notice - - - 743
See COMPANY. 2.

—— Judgment, Form of advertisement in lieu of service of—Unregistered friendly society —Jurisdiction to wind up - 196
See BENEFIT SOCIETY.

—— Legacy, Duty of executor to give notice of—Conditional gift—Beneficial interest of executor on breach of condition—Estoppel - - - - 656
See EXECUTOR. 1.

—— Sale of goods — Conditions as to resale attached—Right of purchaser to disregard conditions - - - 306
See SALE OF GOODS.

"OF"—Read for "or"—Bequest of heirlooms to devolve with real estate—Defeasance clause—Gift over - - - 496
See WILL. 1.

OUTGOINGS — Paving expenses—"Completion of works"—Vendor and purchaser 226
See STREETS. 2.

PARCELS — Foreshore — Conveyance of land bounded by seashore — Plan—Dimensions—Boundary line - - 525
See SEASHORE.

PARK—Settled Land Acts—"Usually occupied therewith"—Easement over mansion-house - - - - 503
See SETTLED LAND. 6.

PARTIES—Title to patent at date of writ—Equitable Assignee—Legal owner not a party—Amendment. - - 122
See PATENT. 1.

PARTNERSHIP—Unregistered friendly society—Insolvency of society—Jurisdiction to wind up—Notice of judgment—Service
See BENEFIT SOCIETY. 196

PATENT — *Infringement — Practice — Patent Action—Parties—Title to Patent at date of Writ—Application for Patent—Assignment of Benefit of Protection—Equitable Assignee—Legal Owner not a Party — Amendment — Rules of Supreme Court*, 1883, *Order XVI., r.* 11.

In June, 1897, B. applied for letters patent for an invention the subject of this action. By a deed of December, 1897, B. assigned to the plaintiffs all that the said invention and the benefit of the protection of the application of June, 1897. The patent was subsequently granted to B., and in accordance with the provisions of the Patents Act, 1883, s. 13, was dated back to June, 1897, the date of the application. In June, 1903, the writ in this action to restrain an alleged infringement of this patent was issued. B. was at this time entered in the register of patents as the owner. In October, 1903, B., in pursuance of the deed of December, 1897, assigned the said letters patent to the plaintiffs. B. had since died:—

Held, that the assignment of December, 1897, did not amount to an assignment of the letters patent, and consequently that the plaintiffs at the date of the commencement of this action were equitable assignees only of the patent, and were not entitled to maintain this action without bringing the legal owner of the patent before the Court. Leave was accordingly given to the plaintiffs to amend their writ and statement of claim by adding the executors of B. as plaintiffs on the terms of allowing the defendants to amend their statement of defence and particulars of objections; the costs of the day and any costs thrown away by reason of the necessity for making this amendment to be the defendants' costs in any event - - Warrington J. 86

The appeal from this decision was dismissed on the ground that there was no order against which the plaintiffs could appeal. E. M. BOWDEN'S PATENT SYNDICATE, LIMITED *v.* HERBERT SMITH & CO. - - - - C. A. 122

PATENT—*continued.*

2. —— *Revocation, Petition for—Hearing in Court.*

A petition for revocation of a patent should be heard in open Court, and not, even by consent, in chambers.

Observations on *In re Scott's Patent*, (1903) 20 Rep. Pat. Cas. 604. *In re* CLIFTON'S PATENT Buckley J. 357

—— Company—Winding-up — Contract to sell assets — Letters patent — Omission to assign before dissolution—Vesting order—Registration - - - 737
See COMPANY. 14.

—— Patent and registered design for same invention—Estoppel — Infringement in ignorance of registration - - 580
See DESIGN.

PAVING EXPENSES—"Completion of works"—Vendor and purchaser—Outgoings 226
See STREETS. 2.

PENALTY — Street — Infringement of building line—Conviction—Mandatory order to pull down - - - - 34
See STREETS. 1.

PERPETUITIES—Charitable legacy—School—Endowment—Trust deed—Forfeiture—Gift over to residue - - 767
See WILL. 3.

PLAN—Foreshore—Conveyance of land bounded by seashore — Parcels — Dimensions — Boundary line - - - 525
See SEASHORE.

PLEADINGS—Amendment—Arbitration clause—Ouster of jurisdiction, Omission to plead - - - - 123
See COMPANY. 7.

POLICY.
See under INSURANCE.

POOR LAW — *Infant — Pauper — Expenses of Maintenance — Arrears — Right of Poor Law Guardians to recover against Property of Infant —Poor Law Amendment Act*, 1849 (12 & 13 *Vict. c.* 103), *s.* 16.

The rule that, where necessaries are supplied to a person who from any disability cannot himself contract, the law implies an obligation to pay for them out of his property extends to the case of an infant pauper supported by guardians in discharge of their statutory duty. This liability is not cut down by the Poor Law Amendment Act, 1849, s. 16, which gives special means of recovering one year's maintenance; and the guardians can therefore recover six years' arrears of moneys expended for the maintenance of an infant pauper. *In re* CLABBON (AN INFANT) Farwell J. 465

POWER OF APPOINTMENT — *Settlement — Limited Power of Appointment—Ultimate Reversion in Donee of Power—Bankruptcy of Donee of Power—Incapacity of Trustee in Bankruptcy to release the Power—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 44—*Conveyancing Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 52—*Lunacy Act*, 1890 (53 & 54 *Vict. c.* 5), *s.* 120.

The capacity which the donee of a limited

POWER OF APPOINTMENT—*continued.*
power of appointment has of releasing the power of appointment for his own benefit cannot, on his bankruptcy, be exercised by his trustee in bankruptcy for the benefit of his estate.
In re Hirst, [1892] W. N. 177, followed. *In re* ROSE. TRUSTEE OF THE PROPERTY OF E. T. ROSE *v.* ROSE - - - - Farwell J. 348

—— Lunatic — Committee — Power vested in lunatic "in the character of trustee"— Power of appointment among children
See LUNACY - - - - 328

POWER OF ATTORNEY — Agent — Scope of authority—Power to sell property belonging to principal—Mortgage - 219
See PRINCIPAL AND AGENT.

POWER OF SALE.
See under SALE.

PRACTICE — *Costs — Taxation — Divorce—Judicial Separation — Implied Authority to Wife to pledge her Husband's Credit—Matrimonial Causes Act*, 1857 (20 & 21 *Vict. c.* 85), *s.* 26.
Sect. 26 of the Matrimonial Causes Act, 1857, absolutely puts an end to the right of a wife who has obtained a decree for judicial separation to pledge her husband's credit or to contract on his behalf during the continuance of the judicial separation except where alimony has been decreed and has not been duly paid.
Consequently, so long as the husband duly pays the alimony which he has been ordered to pay, the wife has no power to pledge his credit for necessaries which the alimony could not have been reasonably supposed to cover, as where the wife has been put to expense by the misconduct of the husband, and the principle of *Turner* v. *Rookes*, (1839) 10 Ad. & E. 47; 50 R. R. 320, no longer applies.
So *held* by the Court of Appeal (reversing Warrington J.).
The provision in the second part of the section with regard to the wife's contracts, that "the husband shall not be liable in respect of any engagement or contract she may have entered into," is governed by the preceding part of the section, which provides that the wife, "whilst so separated," shall be considered a feme sole for the purposes of contract, and is limited to engagements and contracts entered into by the wife during the period of separation.
Consequently the husband is not relieved by a decree of judicial separation from his liability under a contract which has been properly entered into by the wife on his account under her implied agency by reason of the coverture, and which remains in fieri at the date of the decree.
A wife acting under the implied authority of the husband retained a solicitor to defend her in a divorce suit instituted by her husband, and also to commence an action of detinue against her husband in respect of her clothes. The divorce suit was dismissed against the husband with costs, and a decree of judicial separation was made in favour of the wife. After the decree of judicial separation the wife obtained, first, an order increasing the interim alimony which had been previously allowed her, and, afterwards, an order for permanent alimony, and

PRACTICE—*continued.*
the action for detinue was tried and decided in the wife's favour. In the meantime the husband had instituted a second divorce suit, which was also resisted by the wife and dismissed with costs. On the taxation of the wife's costs of these proceedings under an order of course obtained by her solicitor against the husband, the husband, who had duly paid the alimony as required by s. 25 of the Matrimonial Causes Act, 1857, disputed his liability to pay any costs (beyond the party and party costs, which he had been ordered to pay) after the decree of judicial separation:—
Held, (1) as to the costs of the second divorce suit (reversing Warrington J.), that the husband was not liable; (2) as to the costs of the action of detinue (affirming Warrington J.), that the husband was liable inasmuch as the retainer continued until the conclusion of the action unless expressly withdrawn by the husband; (3) as to the costs of the alimony proceedings (affirming Warrington J.), that the husband was liable inasmuch as they were part of the proceedings in the first divorce suit. *In re* WINGFIELD & BLEW (SOLICITORS) - - C. A. 665

2. —— *Costs—Taxation—"Party interested"—Creditor in Administration Action—Solicitors Act*, 1843 (6 & 7 *Vict. c.* 73), *s.* 39.
A creditor who has obtained judgment for the administration of the estate of a deceased testator is "a party interested" within the meaning of s. 39 of the Solicitors Act, 1843, and is therefore entitled to an order for delivery and taxation of bills of costs which have been paid by the testator's executor.
In re Leadbitter, (1878) 10 Ch. D. 388, explained. *In re* JONES & EVERETT
Buckley J. 363

—— Company.
See under COMPANY.

—— Costs, Security for — Company—Winding-up (Voluntary)—Creditor out of jurisdiction claiming to prove - - 359
See COMPANY. 19.

—— Parties—Title to patent at date of writ—Equitable assignee—Legal owner not a party—Amendment - - 122
See PATENT. 1.

—— Patent—Petition for revocation — Hearing in Court - - - - 357
See PATENT. 2.

—— Pleadings—Ouster of jurisdiction, Omission to plead—Trial of action—Amendment —Arbitration clause - - 123
See COMPANY. 7.

—— Service — Notice of judgment, Form of advertisement in lieu of - - 196
See BENEFIT SOCIETY.

PRINCIPAL AND AGENT—*Scope of Authority—Power of Attorney—Power to sell Property belonging to Principal—Property held as Mortgagee—Mortgagee's Statutory Power of Sale—Power to give Discharge for Mortgage Money—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 21, *sub-s.* 4.
A power of attorney authorized the agent to sell any real or personal property then or there-

PRINCIPAL AND AGENT—*continued.*
after belonging to the principal, and also to receive and give a discharge for any moneys then or thereafter owing to the principal by virtue of any security:—
Held, that it did not authorize the agent to sell property held by the principal as mortgagee under the mortgagee's statutory power of sale.
Decision of Kekewich J. affirmed.
Sect. 21, sub-s. 4, of the Conveyancing and Law of Property Act, 1881, which provides that the power of sale conferred by that Act upon mortgagees may be exercised by any person for the time being entitled to give a discharge for the mortgage money, refers to the executors, administrators, and assigns of the mortgagee, and does not extend to a person entitled to give a discharge as agent. *In re* DOWSON AND JENKINS'S CONTRACT - - - - C. A. 219

—— Trust, Express—Moneys remitted to agent for special purpose—Action for account *See* LIMITATION, STATUTES OF. 233

PRINCIPAL AND SURETY—*Mortgage debt—Mortgage Insurance Policy—Construction—Indemnity—Guarantee—Co-suretyship—Contribution.*
A bank advanced 4000*l.* upon a mortgage of a public-house. The mortgage deed contained a joint and several covenant by the mortgagor and D. (who, it was recited, "had agreed to join as surety for the mortgagor") to pay to the bank, on demand by them left at the public-house, the principal and interest, subject to a proviso that D.'s liability should be limited to 1000*l.*; and the deed provided that the power of sale conferred on mortgagees by the Conveyancing Act, 1881, should be exercisable at any time after such demand without any further notice; and it was also provided and agreed that although, as between the mortgagor and D., D. was only surety for the mortgagor, yet, as between D. and the bank, D. should be considered as principal debtor for the whole mortgage debt. The mortgage deed also contained a covenant by the mortgagor to insure the mortgage debt and interest with the plaintiff company in the name of the bank. Accordingly a mortgage insurance policy was effected with the plaintiff company, whereby the company agreed that, if the bank should become entitled under their power of sale to sell the mortgage premises and should give notice in writing thereof to the company, the company would after the expiration of six months from the receipt of the notice pay the principal and interest; and it was agreed that thereupon the bank should assign to the company the mortgage debt and all securities therefor at the time of granting this policy. The company were aware of D.'s covenant. Under this policy, the mortgagor having made default, the company paid 5000*l.* for principal, interest, and costs. The mortgaged property realized 4000*l.*, and the securities for the debt were transferred by the bank to the company. The company claimed to recover the 1000*l.* balance against D.'s estate under the covenant in the mortgage deed:—
Held, (1.) that the policy was not a contract of indemnity, but was a contract of suretyship;

PRINCIPAL AND SURETY—*continued.*
but (2) that upon the true construction of the contract the company were not co-sureties with D. so as to entitle him to contribution, but were guarantors to the bank against the default of both the mortgagor and D.
The principle of *Craythorne* v. *Swinburne*, (1807) 14 Ves. 160; 9 R. R. 264, applied.
Decision of Swinfen Eady J., [1903] 2 Ch. 670, reversed. *In re* DENTON'S ESTATE. LICENSES INSURANCE CORPORATION AND GUARANTEE FUND, LIMITED *v.* DENTON - - - C. A. 178

PRIORITY—Mortgages—Charges on expectancy—Assignor executor—Renunciation by executor—Notice to executor - 385
See MORTGAGE.

PROOF—Company—Winding-up (Voluntary)—Creditor out of jurisdiction claiming to prove - - - - 359
See COMPANY. 19.

PROSPECTUS — Non-disclosure of contracts — Directors' liability—"Knowingly issuing" - - - - 631, 732
See COMPANY. 8, 9.

PUBLIC AUTHORITIES' PROTECTION—*Limitation of Time for Proceedings—Claim under Contract—Contract incidental to Public Duty—Poor Law Guardians—Limitation of Time for Payment—Claim incurred or become due—Amount to be ascertained by Arbitration—Public Authorities Protection Act*, 1893 (56 & 57 *Vict. c.* 61)—*Poor Law (Payment of Debts) Act*, 1859 (22 & 23 *Vict. c.* 49).
The guardians of F. entered into a contract with S., a builder, for certain works required by them for the purpose of carrying out their public duties. The works were completed on May 3, 1901, and paid for in September of that year. S. then claimed an additional sum by way of damages for loss alleged to have been caused by negligence and frequent changes of plans on the part of the defendants. The contract contained an arbitration clause, and the plaintiff's claim was referred to arbitration in November, 1902. The defendants took two preliminary objections—(1) that the claim was for neglect or default in the execution of the defendants' public duty, and proceedings had not been commenced within six months as required by the Public Authorities Protection Act, 1893, and (2.) that the amount claimed became due, if at all, on or before May 3 1901, and by the Poor Law (Payment of Debts Act, 1859, could only be paid within the half-year commencing March 30, 1901, or within three months afterwards. This action was brought for the determination of these two points of law:—
Held, (1.) that the plaintiff's claim was in respect of a private duty arising out of a contract, not for any negligence in performing a statutory or public duty, and the Public Authorities Protection Act did not apply; (2.) that the sum (if any) owing to the plaintiff did not become due within the meaning of the Poor Law (Payment of Debts) Act, 1859, until the amount was ascertained by arbitration according to the contract.
SHARPINGTON *v.* FULHAM GUARDIANS
Farwell J. 449

PUBLIC AUTHORITIES' PROTECTION—*contd.*
—— Public authority—Limitation of time for proceedings—Poor law guardians 449
See PUBLIC AUTHORITIES' PROTECTION.

PUBLIC DOCUMENTS — Evidence — Ancient reports to Government departments—Depositions—Maps and charts - 534
See CUSTOM.

PUBLIC HEALTH — Street — Infringement of building line — Penalty — Subsequent action by Attorney-General for injunction—Laches - - - 34
See STREETS. 1.

—— Street—Paving expenses—"Completion of works"—Vendor and purchaser—Outgoings - - - - 226
See STREETS. 2.

PUBLIC HEALTH (LONDON)—Sanitary works, Cost of—Repairs—Capital or income
See SETTLED LAND. 7. 561

PURCHASER—Vendor and.
See under VENDOR AND PURCHASER.

RECONSTRUCTION—Ultra vires—Memorandum—Powers - - - 268, 593
See COMPANY. 10, 11.

RECEIVER—Appointment of—Notice to vendor—Rescission of contract by consent—Secured creditor - - - 93
See VENDOR AND PURCHASER. 2.

RECITAL—Ambiguity—Explanation by reference to recital in codicil—Gift to a class—Lapse - - - - 52
See WILL. 2.

"RECONSTRUCTION"—Company—"Winding-up for the purpose of reconstruction or amalgamation" - - - 268
See COMPANY. 10.

REDUCTION OF CAPITAL—Sanction of Court—Lost capital—Reserve—Apportionment of loss - - - - 208
See COMPANY. 12.

REGISTRAR—Appeal from—Company—Winding-up - - - - 170
See COMPANY. 16.

REGISTRATION — Company — Winding-up — Contract to sell assets—Letters patent—Omission to assign before dissolution—Vesting order - - - 737
See COMPANY. 14.

—— Patent and registered design for same invention — Estoppel — Application to vacate registration - - - 580
See DESIGN.

REMAINDERMAN—Tenant for life and.
See under SETTLED LAND.

REMOTENESS—Contingent remainder or executory devise - - - 95
See WILL. 5.

RENUNCIATION—By executor—Charge on Expectancy—Notice to executor—Priority—Assignor executor - - 385
See MORTGAGE.

REPAIRS—Sanitary works; Cost of—Tenant for life and remainderman - - 561
See SETTLED LAND. 7.

RESCISSION—Purchaser's interest in land—Appointment of receiver—Rescission of contract by consent - - 93
See VENDOR AND PURCHASER. 2.

RESIDENCE—Condition or trust—Fetter on power of sale - - - 777
See SETTLED LAND. 8.

RESIDUE—Direction to pay "my duties" out of—Estate duty - - - 345
See WILL. 6.

RESTRICTIVE COVENANTS.
See under COVENANT.

RETAINER—Executor—Debt—Ready money—Money on deposit - - - 66
See HUSBAND AND WIFE.

—— Insolvent estate—Executor of sole trustee—Disclaimer of trust - - - 774
See EXECUTOR. 2.

RETIREMENT — Education — Committee — Scheme — Retirement of members — Jurisdiction of council to alter dates
See LOCAL GOVERNMENT. 1. 481

REVENUE—*Estate Duty—Settlement Estate Duty—Incidence—Express Provision—"The Death Duties payable out of my Estate"—Direction to pay out of Specific Fund—Finance Act*, 1896 (59 & 60 *Vict. c.* 28), *s.* 19, *sub-s.* 1.

A testatrix directed "the death duties payable out of my estate" to be paid out of a specific fund:—

Held, that this was an "express provision" within s. 19, sub-s. 1, of the Finance Act, 1896, so that the settlement estate duty on chattels settled by the will was payable out of the specific fund.

In re Pimm, [1904] 2 Ch. 345, followed.

In re Lewis, [1900] 2 Ch. 176, distinguished.

In re CAYLEY. AWDRY *v.* CAYLEY
Swinfen Eady J. 781

2. —— *Estate Duty—Succession Duty—Settlement by Act of Parliament—Restriction against Alienation—Power of Jointuring—Power of Sale—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 58—*Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 5, *sub-ss.* 1, 2, 5; *s.* 22—*Succession Duty Act*, 1853 (16 & 17 *Vict. c.* 51), *ss.* 2, 4.

The power of sale conferred by s. 58 of the Settled Land Act, 1882, upon a tenant in tail in possession of lands settled by Act of Parliament with a restriction upon alienation does not make such a tenant in tail a person capable of alienating the lands so settled within the meaning of sub-s. 5 of s. 5 of the Finance Act, 1894, which provides that where lands are so settled by Act of Parliament that no one of the persons successively in possession thereof is capable of alienating the same, the property passing on the death of any person in possession of the lands shall be the interest of his successor therein, and such interest shall be valued for the purpose of estate duty in like manner as for the purpose of succession duty.

REVENUE—*continued.*

Estate duty payable under sub-s. 5 of s. 5 is payable out of income and not out of capital.

By a private Act passed in the reign of Henry VIII. to give effect to a family arrangement with reference to Lord Broke's estates, a portion of the estates was settled upon his two daughters A. and E. and the heirs of their bodies as co-parceners with cross-remainders between them, and it was provided that no tenant in tail should alienate the estates except for the purpose of jointuring a wife—an exception which the Court construed as implying a power in the tenant in tail under the existing law to jointure by will. Owing to the failure of the heirs of the body of A. the entirety of these estates had now become vested in the heirs of the body of E. The Crown claimed (1) that estate duty was payable on the death of each tenant in tail in possession under sub-s. 5 of s. 5 of the Finance Act, 1894; (2) that upon the grant of a jointure by will succession duty was payable by the widow, either under s. 2 or under s. 4 of the Succession Duty Act, 1853, in respect of one moiety of her jointure, on the footing that her interest was a succession derived as to one moiety from A., and and as to the other moiety from E. as predecessor, it being conceded that as to the moiety derived from E. the succession duty was covered by the payment of estate duty as provided by s. 1 of the Finance Act, 1894:—

Held, (1) that sub-s. 5 of s. 5 of the Finance Act, 1894, applied; (2) that the predecessor of the jointress was either her own husband or E., the lineal ancestress of the husband, and that no succession duty was payable. *In re* BOLTON ESTATES ACT, 1863 - - - **Joyce J. 289**

3. —— *Income Tax—Gas Company—Standard Rate of Dividend—Payment of Dividend free of Income Tax—Income Tax Act*, 1842 (*5 & 6 Vict. c.* 35), *ss.* 40, 54, 60, *Sched. A, No. III., rule* 3.

Where by the special Act of a gas company it was provided that the profits divisible in any year amongst the ordinary shareholders should not exceed a given rate:—

Held, that in calculating the rate of dividend income tax ought to be included. ATTORNEY-GENERAL *v.* ASHTON GAS COMPANY - **C. A. 621**

—— Estate duty—Settlement estate duty—Direction to pay "my duties" out of residue
See WILL. 6. **345**

—— Income tax—Debenture—Deficient security—Principal or interest—Appropriation of payments - - - - **569**
See COMPANY. 1.

REVOCATION—Patent—Petition—Hearing in Court - - - - **357**
See PATENT. 2.

ROYAL CHARTER—Land transfer—Consent of Charity Commissioners to sale of charity lands—Entry on register with restriction - - - - - **252**
See CHARITY. 2.

ROYALTIES—Mining—Wasting property—Interest, Rate of—Income of invested surplus - - - - **4**
See SETTLED LAND. 5.

RULES OF SUPREME COURT, 1883—Order XVI., r. 11—*Parties* - - - **122**
See PATENT. 1.

—— **Order LV., rr. 35, 35*a***—*Chambers in the Chancery Division* - - - **196**
See BENEFIT SOCIETY.

SALE—Agent—Scope of authority—Power of attorney—Power to sell property belonging to principal—Mortgage - **219**
See PRINCIPAL AND AGENT.

—— Fetter on power of sale—Condition of residing and providing a home for third party—Condition or trust - - **777**
See SETTLED LAND. 8.

—— Heirlooms—Application of proceeds—Compound settlement - - - **72**
See SETTLED LAND. 4.

—— Land transfer.
See under LAND TRANSFER.

—— Settled land.
See under SETTLED LAND.

—— Vendor and purchaser.
See under VENDOR AND PURCHASER.

SALE OF GOODS—*Conditions as to Resale attached—Notice—Right of Purchaser to disregard Conditions.*

On the sale of goods a condition as to the price at which they may be resold cannot, in the absence of agreement, be imposed on the purchaser, even though he bought with notice of the condition.

A retail trader bought from the agent of the licensee of a patent an article manufactured by the licensee under the patent. On the inside of the lid of a box in which the article was packed was printed a condition that the goods were not to be resold at less than a specified price. The retail trader had sold some of the goods at less than the specified price. In an action by the licensee to restrain the retailer from so doing:—

Held, that, even if the retailer bought with notice of the condition, it could not be enforced against him.

Decision of Farwell J. reversed.

Decision of Swinfen Eady J. in *Taddy & Co. v. Sterious & Co.*, [1904] 1 Ch. 354, approved and adopted. MCGRUTHER *v.* PITCHER - **C. A. 306**

SANCTION—Reduction of capital—Sanction of Court—Lost capital—Reserve—Apportionment of loss - - - **208**
See COMPANY. 12.

SANITARY WORKS—Cost of—Repairs—Capital or income - - - - **561**
See SETTLED LAND. 7.

SCHOOL—Charitable legacy—Endowment—Trust deed—Forfeiture—Gift over to residue—Perpetuities - - **767**
See WILL. 3.

SCHOOL BOARD—Transfer of property—Vesting—Consols - - - - **716**
See LOCAL GOVERNMENT. 2.

SEASHORE—*Foreshore—Conveyance by Land Bounded by Seashore—Parcels—Plan—Dimensions—Boundary Line—Falsa Demonstratio—*

SEASHORE—*continued.*

Evidence—Field-book Entries—Deceased Surveyor—Professional Duty.

Conveyance of land bounded "on or towards the west by the seashore" and in other directions by well-defined boundaries:—

Held, that the land conveyed extended to and was bounded by the seashore or foreshore in the strict and legal sense, and that the dimensions stated in the parcels and plan, and the western boundary line marked on the plan, so far as inconsistent with this construction, must be rejected as falsa demonstratio.

Field-book entries made by a deceased surveyor for the purpose of a survey on which he was professionally employed are not entries in the discharge of professional duty within *Price* v. *Earl of Torrington*, (1703) 1 Salk. 285, and are not admissible in evidence. MELLOR *v.* WALMESLEY - - - **Swinfen Eady J. 525**

2. —— *Foreshore—Public Right of Bathing.*

The public have no common law right to use the foreshore or to pass and repass thereon for the purpose of bathing in the sea, whether the foreshore is the property of the Crown or of a private owner.

Blundell v. *Catterall*, (1821) 5 B. & Al. 268; 24 R. R. 353, followed. BRINCKMAN *v.* MATLEY **C. A. 313**

—— Custom to dry fishing nets—Changes in user—Encroachment and recession of sea—Accretion - - - **534**
See CUSTOM.

SECURED CREDITOR—Receiver, Appointment of—Notice to vendor—Rescission of contract by consent - - **93**
See VENDOR AND PURCHASER. 2.

SECURITY FOR COSTS—Misfeasance summons
See COMPANY. 17. **1**

SEPARATE ESTATE—Married woman—Contract—Acknowledgment - - **66**
See HUSBAND AND WIFE.

SEPARATION DEED—*Settlement on Children on Marriage—Resumption of Cohabitation.*

Appeal from a decision of Kekewich J., [1904] 1 Ch. 451, compromised. *In re* SPARK'S TRUSTS. SPARK *v.* MASSEY - - - **C. A. 121**

SERVICE—Notice of judgment, Form of advertisement in lieu of service of—Unregistered friendly society—Jurisdiction to wind up - - - - **196**
See BENEFIT SOCIETY.

SETTLED LAND—*Apportionment—Loss—Settled Fund—Authorized Investment—Mortgage—Deficient Security—Tenant for Life and Remainderman—Capital and Income.*

Where a fund is settled upon tenant for life and remaindermen, and is invested in accordance with the powers of the settlement upon a mortgage which proves to be insufficient for the payment of principal and interest in full, the sum realized by the security ought to be apportioned between the tenant for life and the remaindermen in the proportion which the amount due for arrears of interest bears to the amount due in respect of the capital debt.

SETTLED LAND—*continued.*

In re Moore, (1885) 54 L. J. (Ch.) 432, and *In re Alston*, [1901] 2 Ch. 584, followed.

In re Foster, (1890) 45 Ch. D. 629, and *In re Phillimore*, [1903] 1 Ch. 942, overruled.

Decision of Kekewich J. affirmed. *In re* ATKINSON. BARBERS' COMPANY *v.* GROSE-SMITH **C. A. 160**

2. —— *Capital Moneys — Improvements — Scheme approved by Trustees—Order of Court for Payment of Moneys expended—Discretion of Court—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 26.

Where an application is made to the Court under s. 26, sub-s. 2 (iii.), of the Settled Land Act, 1882, for an order sanctioning the application of capital moneys in paying for work done under a scheme of improvements approved by the trustees, the duties of the Court are not merely ministerial; it has a discretion, and must be satisfied that the scheme is a proper one. It is not sufficient to shew that the trustees have approved the scheme and the work has been done in pursuance of it. *In re* KECK'S SETTLEMENT - - - - **Farwell J. 22**

3. —— *Compound Settlement—Deed granting Annuities — Settlement by Will of Grantor's Interest in Land subject to the Annuities.*

By a deed dated August 3, 1886, certain real and leasehold property was assured to trustees upon trust for such persons as P. should by deed appoint. By deed dated August 4, 1886, P. appointed that this property should be held upon trust for himself for life, and subject thereto to pay certain annuities to five persons for their respective lives, and subject thereto in trust for P. absolutely. P. died in February, 1887, having by his will given his residuary estate, which included the interest he had retained in the property subject to the annuities, upon trusts equivalent to a strict settlement, under which the plaintiff was tenant for life and his infant son tenant in tail in remainder:—

Held, that the deeds of August 3 and 4, 1886, and the will formed a compound settlement under the Settled Land Acts, and that the plaintiff, as tenant for life under this compound settlement, could sell the property discharged from the annuities. *In re* PHILLIMORE'S ESTATE. PHILLIMORE *v.* MILNES - **Farwell J. 460**

4. —— *Compound Settlement — Heirlooms — Sale—Application of Proceeds—Discharge of Incumbrances—Heirlooms vested in Tenant in Tail—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 37, *sub-ss.* 1, 2; *s.* 2, *sub-s.* 9; *s.* 21, *clause (ii.)*; *s.* 53.

The Costessey Hall estates were settled by a deed of January 26, 1874, under which Lord Stafford was tenant for life in possession. By the will of the late Lord Stafford he bequeathed certain pictures upon trust to permit the same to be used and enjoyed by the person who under the settlement of 1874 should for the time being be entitled to the Costessey Hall estates, to be held as heirlooms for the successive owners of the hall, but not to vest absolutely in any tenant in tail male by purchase who should not attain the age of twenty-one years or die under that age leaving issue male. The testator died in

SETTLED LAND—*continued.*

1884. One of the pictures bequeathed as heirlooms had been recently sold for a large sum of money. The money was paid to the trustees of the will and invested by them in Consols. Byrne J. held that the settlement was a compound settlement, and he appointed the trustees of the will to be trustees for the purposes of the Settled Land Acts of the settlement of the heirlooms and the proceeds of sale thereof created by the deed of 1874 and the will. The heirlooms were now vested in an infant female tenant in tail in remainder. The tenant for life asked that the trustees of the compound settlement should apply 15,000*l.*, part of the proceeds of sale of the picture, in discharge of a mortgage on land settled by the deed of 1874:—

Held, that the effect of the order of Byrne J. was that both the land settled by the deed of 1874 and the heirlooms must be treated as if they had been settled by the same document; that the words "land" in s. 37 and "settled land" in s. 21, clause (ii.), of the Settled Land Act, 1882, meant the land by reference to the limitations of which the heirlooms were settled by the will; that the slight difference in the limitations of the deed and the will, and the fact that the heirlooms were vested in the tenant in tail, were not sufficient ground for distinguishing *In re Duke of Marlborough's Settlement*, (1885) 30 Ch. D. 127; (1886) 32 Ch. D. 1; that the investment in Consols by the trustees before they were appointed trustees of the compound settlement did not prevent the desired application of the money; that the tenant for life, although a trustee under s. 53, was not committing a breach of trust; and that the money ought to be applied in the discharge of the mortgage. *In re* LORD STAFFORD'S SETTLEMENT AND WILL. GERARD *v.* STAFFORD
Warrington J. 72

5. —— *Interest—Tenant for Life and Remainderman—Capital or Income—Will—Conversion—Postponement of Conversion—Wasting Property—Mining Royalties—Rate of Interest—Income of invested Surplus.*

Interest at 3, and not at 4, per cent. must at the present day be computed in applying the principle of *Brown* v. *Gellatly*, (1867) L. R. 2 Ch. 751, whereby, when wasting securities, forming part of the residuary estate of a testator given upon trust for conversion, are retained under a power to postpone conversion, the tenant for life is entitled during the period of postponement to interest on the value of the securities.

In re Lynch Blosse, [1899] W. N. 27 (8), followed.

Where, in such a case, the interest at 3 per cent. is paid out of the actual income of the wasting securities to the tenant for life, and the balance is invested as capital of the estate, the tenant for life is entitled to the income of the invested fund. *In re* WOODS. GABELLINI *v.* WOODS - - - - Kekewich J. 4

6. —— *Lease, Agreement for—Principal Mansion House—"Park"—"Usually occupied therewith"—Easement over Mansion House—Invalidity of Agreement—Liability of Lessor—Settled Land Act*, 1890 (53 & 54 *Vict. c.* 69), *s.* 10.

Sect. 10 of the Settled Land Act, 1890, which precludes the life tenant (inter alia) from leasing "the principal mansion house (if any) on any settled land, and the pleasure grounds and park and lands (if any) usually occupied therewith," without the consent of the trustees or an order of the Court, applies to a park not usually occupied with the principal mansion house, the words "usually occupied therewith," referring merely to the words "lands (if any)" immediately preceding them.

The section also applies to the lease of an easement over the same property.

Dowager Duchess of Sutherland v. *Duke of Sutherland*, [1893] 3 Ch. 169, followed.

The word "park" as used in the Settled Land Acts is not confined to an ancient legal park, but includes an ordinary private park.

A life tenant without the consent of the trustees agreed to let the park, together with an easement over the mansion house, for a term of years. The lessees entered and held under the agreement, which contained no provision as to title. The lessor died without being required to execute a lease, and the lessees were ejected by the remainderman. It did not appear that the lessor could have obtained the trustees' consent:—

Held, that the lessees were not entitled to damages against the lessor's estate.

Day v. *Singleton*. [1899] 2 Ch. 320, distinguished. PEASE *v.* COURTNEY
Swinfen Eady J. 503

7. —— *Repairs—Sanitary Works, Cost of—Tenant for Life and Remainderman—Capital or Income — Public Health (London) Act*, 1891 (54 & 55 *Vict. c.* 76), *ss.* 4, 121, 141.

Where a settled trust fund was invested under the powers of the settlement in the purchase of freehold houses in the City and the trustees were required by the corporation under the Public Health (London) Act, 1891, to do certain repairs on the property, and the equitable tenant for life, having by arrangement with the trustees done the repairs, applied to the Court for a charge on the corpus for the cost of the repairs, but ultimately waived his claim except as to so much of the expenditure as should be found to have been incurred in respect of repairs in the nature of permanent improvements:—

Held, that he was entitled by subrogation to the rights of the trustees to a charge on the corpus for that amount.

Decision of Kekewich J. reversed.[1]

Semble, where the trustees of a settled estate apply to the Court to be indemnified out of the estate for the cost of repairs done by them on the property in answer to a demand by a sanitary authority, it is competent to the Court to determine according to the circumstances of the case how the cost shall be borne as between tenant for life and remainderman. *In re* FARNHAM'S SETTLEMENT. LAW UNION AND CROWN INSURANCE COMPANY *v.* HARTOPP - - C. A. 561

8. —— *Sale—Limited Owner—Person having Powers of Tenant for Life—Devise in Fee Simple with Executory Limitation over — Condition of residing and providing a Home for Third Party—Condition or Trust—Fetter on Power of Sale—*

SETTLED LAND—*continued.*

Sale—Application of Proceeds—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 2, *sub-s.* 5; *s.* 51, *sub-s.* 1; *s.* 58, *sub-s.* 1 (*ii.*).

A testatrix gave her residuary estate, in the events which happened, (1) to her niece C. on condition that she resided in the testatrix's house during the life of the testatrix's sister M., and provided there a home for M. so long as she wished; (2) in the event of C. not complying with the condition, to another niece upon the like condition; (3) in the event of neither niece complying with the condition, upon trust for M. for life with other trusts over on her death. At the date of the testatrix's death M. was a lunatic not so found, confined in an asylum, and was not expected to recover her faculties. Upon a summons by C. under the Settled Land Acts:—

Held, that C. was a person having the powers of a tenant for life under the Settled Land Act, 1882; that the condition as to providing a home was void so far as it prevented C. from exercising her power of sale; and that she was entitled to sell the house and keep the proceeds absolutely. *In re* RICHARDSON. RICHARDSON *v.* RICHARDSON **Joyce J. 777**

—— Estate duty—Succession duty—Settlement by Act of Parliament — Restriction against alienation—Power of sale **289**
See REVENUE. 2.

SETTLED PROPERTY.
See under SETTLED LAND.

SETTLEMENT—*Equitable Estate in Fee—Conveyance to Trustees — Omission of Words of Limitation—Construction of Settlement.*

By a post-nuptial settlement made in 1884 between W. C. Irwin of the one part, and trustees "whom and their executors or administrators are intended to be hereinafter included in the designation of the said trustees" of the other part, it was recited that Irwin was absolutely entitled to freehold hereditaments, "which said freehold property" he was desirous to settle in favour of his wife and children. It was then witnessed that in pursuance of such desire he assigned the "said freehold hereditaments" to the trustees (without the word "heirs"), upon trust for sale and investment and to pay the income to Mrs. Irwin for life and then to the settlor for life and then for their children. The settlement contained a proviso that if any present or future trustee died or wished to retire it should be lawful for the surviving or continuing trustee or, if there should be no continuing trustee, for the retiring trustee to appoint another trustee in his place, and that the trust funds and premises should thereupon be vested in the new trustees. Amongst the settlor's freeholds were some in which he only had an equitable estate:—

Held, that by reason of the absence of words of limitation there passed to the trustees merely an estate in the settlor's equitable freeholds for the lives of the trustees named in the deed and the survivor of them. *In re* IRWIN. IRWIN *v.* PARKES **Buckley J. 752**

2. —— *Real Estate—Limitations—Equitable Estate in Fee—No Words of Inheritance.*

A limitation, in a deed, of a trust of real estate for A., without any words of inheritance, may confer the equitable fee upon him where the intention to do so is expressed or sufficiently shewn upon the face of the instrument.

By surrender and a settlement dated in 1831 copyhold hereditaments were limited in trust for M. for life, and after her death for her husband, and after the death of the survivor in trust for the children of the marriage equally as tenants in common, and in default of issue then to such uses as M. should declare by her will, with remainder to the right heirs of M. There were three children of the marriage:—

Held, that there being upon the face of the instrument sufficient indication of intention on the part of the settlor that absolute interests should be given, the three children, notwithstanding the absence of any limitation to their "heirs," were entitled as tenants in common in equal shares for equitable estates in customary fee simple.

Pugh v. *Drew*, (1869) 17 W. R. 988, followed.

In re Whiston's Settlement, [1894] 1 Ch. 661, considered and distinguished. *In re* TRINGHAM'S TRUSTS. TRINGHAM *v.* GREENHILL **Joyce J. 487**

—— Cohabitation, Resumption of—Settlement on children on marriage - - **121**
See SEPARATION DEED.

—— Estate duty—Direction to pay "my duties" out of residue - - - **345**
See WILL. 6.

—— Power of appointment.
See under POWER OF APPOINTMENT.

—— Settled land.
See under SETTLED LAND.

SETTLEMENT ESTATE DUTY—Express provision—Direction to pay out of specific fund - - - - - **781**
See REVENUE. 1.

SHAREHOLDERS AND SHARES.
See under COMPANY.

SOLICITOR — *Costs — Taxation — Third Party, Taxation by—Taxation of Bill of Mortgagee's Solicitor on Application of Mortgagor—Solicitor and Client—Solicitors Act*, 1843 (6 & 7 *Vict. c.* 73), *s.* 38.

On the taxation, under the third-party section (s. 38) of the Solicitors Act, 1843, of the bill of a mortgagee's solicitor at the instance of the mortgagor, items which the mortgagor would not be liable to pay as between himself and the mortgagee must be disallowed, even though the solicitor would be entitled to charge them as against his client, the mortgagee.

In re Gray, [1901] 1 Ch. 239, approved and adopted. *In re* LONGBOTHAM & SONS **C. A. 152**

—— Costs—Taxation—Creditor in administration action—"Party interested" **363**
See PRACTICE. 2.

—— Trustee — Breach of trustee — Delay in accounting—Liability to indemnify co-trustee - - - - **785**
See TRUSTEE.

SPECIFIC DEVISE—Estate duty—Direction to pay "my duties" out of residue - **345**
See WILL. 6.

SPECIFIC PERFORMANCE—Frauds, Statute of —Part performance - - 339
See VENDOR AND PURCHASER. 3.

STATUTES:—

1530.

22 Hen. 8, c. 5—*Bridges* - - 513
See BRIDGES.

1605.

3 Jac. 1, c. 18—*New River Company* - 513
See BRIDGES.

1606.

4 Jac. 1, c. 12—*New River Company* - 513
See BRIDGES.

1838.

1 & 2 Vict. c. 110, s. 13—*Judgments* - 93
See VENDOR AND PURCHASER. 2.

1842.

5 & 6 Vict. c. 35, ss. 40, 54, 60, Sched. A, No. III., r. 3—*Income Tax* - 621
See REVENUE. 3.

1843.

6 & 7 Vict. c. 73, c. 39—*Solicitors* - 363
See PRACTICE. 2.

—— —— s. 38 - - - - 152
See SOLICITOR.

1849.

12 & 13 Vict. c. 103, s. 16—*Poor Law* - 465
See POOR LAW.

1853.

16 & 17 Vict. c. 51, ss. 2, 4—*Succession Duty* 289
See REVENUE. 2.

1855.

18 & 19 Vict. c. 124, s. 29—*Charitable Trusts* 252
See CHARITY. 2.

1857.

20 & 21 Vict. c. 85, s. 26—*Matrimonial Causes* 665
See PRACTICE. 1.

1859.

22 & 23 Vict c. 49—*Poor Law—Payment of Debts* - - - - 449
See PUBLIC AUTHORITIES' PROTECTION.

1862.

25 & 26 Vict. c. 89, s. 38—*Companies* - 468
See COMPANY. 15.

—— —— ss. 133, 161 - - - 593
See COMPANY. 11.

—— —— ss. 142, 143 - - - 737
See COMPANY. 14.

1867.

30 & 31 Vict. c. 131, s. 38—*Companies* 631, 732
See COMPANY. 8, 9.

1870.

33 & 34 Vict. c. 71, s. 22—*National Debt* 716
See LOCAL GOVERNMENT. 2.

STATUTES—*continued.*

33 & 34 Vict. c. 75, s. 30—*Elementary Education* - - - - - 716
See LOCAL GOVERNMENT. 2.

1875.

38 & 39 Vict. c. 55, ss. 150, 257—*Public Health* 226
See STREETS. 2.

—— —— ss. 157, 158, 251 - - 34
See STREETS. 1.

1877.

40 & 41 Vict. c. 26, s. 3—*Companies* - 208
See COMPANY. 12.

1881.

44 & 45 Vict. c. 41, s. 21, sub-s. 4—*Conveyancing and Law of Property* - - 219
See PRINCIPAL AND AGENT.

—— —— s. 43, sub-s. 2 - - - 635
See INFANT.

—— —— s. 52 - - - - 348
See POWER OF APPOINTMENT.

1882.

45 & 46 Vict. c. 38, s. 2, sub-s. 5; s. 51, sub-s. 1; s. 58, sub-s. 1 (ii.)—*Settled Land* 777
See SETTLED LAND. 8.

—— —— s. 26 - - - - 22
See SETTLED LAND. 2.

—— —— s. 37, sub-ss. 1, 2; s. 2, sub-s. 9; s. 21, clause (ii.); s. 53 - - 72
See SETTLED LAND. 4.

—— —— s. 58 - - - - 289
See REVENUE. 2.

1883.

46 & 47 Vict. c. 52, s. 44—*Bankruptcy* - 348
See POWER OF APPOINTMENT.

—— —— s. 102, sub-s. 1 - - 57
See BANKRUPTCY.

46 & 47 Vict. c. 57, ss. 13, 47, 51, 58, 59, 60, 61, 90—*Patents, Designs, and Trade Marks* - - - - 580
See DESIGN.

—— —— ss. 23, 87, 90 - - - 737
See COMPANY. 14.

1888.

51 & 52 Vict. c. 52, s. 3—*Public Health—Buildings in Streets* - - 34
See STREETS. 1.

1890.

53 & 54 Vict. c. 5, ss. 116, 128—*Lunacy* 328
See LUNACY.

—— —— s. 120 - - - - 348
See POWER OF APPOINTMENT.

53 & 54 Vict. c. 65, s. 10—*Winding-up* - 1
See COMPANY. 17.

53 & 54 Vict. c. 69, s. 10—*Settled Land* 503
See SETTLED LAND. 6.

1891.

54 & 55 Vict. c. 76, ss. 4, 121, 141—*Public Health—London* - - - 561
See SETTLED LAND. 7.

STATUTES—*continued.*

1892.

55 & 56 Vict. c. 39, s. 4—*National Debt—Stockbrokers' Relief* - - 716
See LOCAL GOVERNMENT. 2.

1893.

56 & 57 Vict. c. 53, ss. 25, 35—*Trustees* - 737
See COMPANY. 14.

56 & 57 Vict. c. 61—*Public Authorities Protection* - - - - 449
See PUBLIC AUTHORITIES' PROTECTION.

56 & 57 Vict. c. 63, s. 1—*Married Women's Property* - - - - 66
See HUSBAND AND WIFE.

1894.

57 & 58 Vict. c. 30, s. 5, sub-ss. 1, 2, 5; s. 22—*Finance* - - - - 289
See REVENUE. 2.

1896.

59 & 60 Vict. c. 28, s. 19, sub-s. 1—*Finance* 781
See REVENUE. 1.

1902.

2 Edw. 7, c. 42, ss. 5, 25; Sched. 2, clause 1—*Education* - - - - 716
See LOCAL GOVERNMENT. 2.

—— —— ss. 11, 13 - - - 767
See WILL. 3.

—— —— s. 17, sub-s. 1; s. 21, sub-s. 3 481
See LOCAL GOVERNMENT. 1.

STREETS — *Building Line, Infringement of — Statutory Remedy — Penalty — Conviction—Subsequent Action by Attorney-General for Injunction —Laches—Mandatory Order to pull down—Local Government — Urban Authority — Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 157, 158, 251—*Public Health* (*Buildings in Streets*) *Act*, 1888 (51 & 52 *Vict. c.* 52), *s.* 3.

The penalty prescribed by s. 3 of the Public Health (Buildings in Streets) Act, 1888, for a breach of the prohibition in the first part of the section against infringing the building line is not the only remedy for the offence. It is a public general Act, and an injunction will lie at the suit of the Attorney-General on behalf of the public to restrain the infringement of the building line, and in a proper case a mandatory order to pull down will be made, even although the offender has been previously convicted and fined under the section for the offence by a Court of summary jurisdiction.

Attorney-General v. *Ashbourne Recreation Ground Co.*, [1903] 1 Ch. 101, followed.

Observations on imputing laches to the Attorney-General and the relators in an action for injunction where the latter are a local authority. ATTORNEY-GENERAL *v.* WIMBLEDON HOUSE ESTATE COMPANY, LIMITED - - Farwell J. 34

2. —— *Paving Expenses—Charge of Expenses on Frontager's Property—Date from which Charge takes effect—"Completion of Works"—Vendor and Purchaser—Outgoings—Local Government—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 150, 257.

The expenses incurred by a local authority for paving and other works executed by them under the provisions of s. 150 of the Public Health Act, 1875, first become, within the meaning of s. 257 of the Act, "a charge on the premises in respect of which they were incurred" as from the date of the completion of the works.

Decision of Byrne J., [1904] 1 Ch. 493, affirmed.

Tubbs v. *Wynne*, [1897] 1 Q. B. 74, distinguished.

Per Romer L.J.: *In re Highett and Bird's Contract*, [1903] 1 Ch. 287, explained. *In re* ALLEN AND DRISCOLL'S CONTRACT - C. A. 226

SUCCESSION DUTY—Settlement by Act of Parliament—Restriction against alienation
See REVENUE. 2. 289

SUPPORT — Mines — Reservation of manorial rights—Damage to surface—Compensation - - - - - 419
See INCLOSURE ACT.

SURFACE — Damage to—Compensation—Mines —Reservation of manorial rights—Support - - - - - 419
See INCLOSURE ACT.

SURVEYOR — Evidence — Field-book entries — Deceased surveyor—Professional duty
See SEASHORE. 525

TAXATION—Costs—Creditor in administration action—"Party interested" - 363
See PRACTICE. 2.

TENANT FOR LIFE AND REMAINDERMAN.
See under SETTLED LAND.

THIRD PARTY—Taxation of costs by—Taxation of bill of mortgagee's solicitor on application of mortgagor - - 152
See SOLICITOR.

TIME—Public authority—Limitation of time for proceedings—Poor law guardians 449
See PUBLIC AUTHORITIES' PROTECTION.

TRANSFER—Company—Debentures 448, 474, 743
See COMPANY. 2, 3, 4.

TRUST—Condition or—Fetter on power of sale—Condition of residing and providing a home for third party - - 777
See SETTLED LAND. 8.

TRUSTEE—*Breach of Trust—Negligence—Delay in accounting — Solicitor Trustee — Liability to indemnify Co-trustee—Costs of Action by Cestuis que Trust.*

A solicitor trustee, to whom the management of the trust has been left as the acting trustee, is liable to indemnify his co-trustee against the costs of an action caused by his negligent conduct of the trust business, even where no actual loss has been thereby occasioned to the trust estate.

Lockhart v. *Reilly*, (1856) 25 L. J. (Ch.) 697, applied. *In re* LINSLEY. CATTLEY *v.* WEST Warrington J. 785

—— Account, Action for—Express trust—Principal and agent—Moneys remitted to agent for special purpose - - 233
See LIMITATION, STATUTES OF.

TRUSTEE—*continued.*

—— Company—Winding-up—Contract to sell assets — Letters patent — Omission to assign before dissolution—Vesting order —Registration - - - 737
See COMPANY. 14.

—— Executor.
See under EXECUTOR.

—— Lunatic—Committee—Power of appointment vested in lunatic "in the character of trustee" — Power of appointment among children - - - 328
See LUNACY.

ULTRA VIRES — Company — Debentures—Borrowing powers—Knowledge of director of lending company of intended misapplication - - - - 608
See COMPANY. 5.

—— Company — Debenture — Validity — Joint debentures issued by three companies
See COMPANY. 6. 234

—— Company — Reconstruction—Memorandum of association—Powers - - 593
See COMPANY. 11.

UNCERTAINTY — Gift for "charitable and benevolent institutions" not void for uncertainty—Will—Construction 354
See CHARITY. 3.

VENDOR AND PURCHASER—*Covenants to be entered into by Purchaser—Freeholds subject to Restrictive Covenants.*

In an agreement for the sale of freehold land it was stated that the property was subject to restrictive covenants. The vendor had covenanted with his vendor to observe and perform those covenants and to indemnify his vendor:—

Held, that the purchaser ought to enter into a similar covenant with the vendor, but that the covenant should be prefaced with the words "with the object and intention of affording to [the vendor], his heirs, executors, and administrators, a full and sufficient indemnity in respect of [the restrictive covenants], but not further or otherwise." *In re* POOLE AND CLARKE'S CONTRACT - - - - - C. A. 173

2. —— *Lien or Charge—Real Estate—Payment of Deposit—Purchaser's Interest in Land—Judgment Creditor of Purchaser—Equitable Execution—Appointment of Receiver—Notice to Vendor—Rescission of Contract by Consent—Payment by Vendor to Purchaser—Secured Creditor—Judgments Act*, 1838 (1 & 2 *Vict. c.* 110), *s.* 13.

In June, 1901, the purchaser, under a contract for the sale of land (which was to be completed on September 29), paid a deposit and was let into possession. The purchaser did not complete at the time appointed, and litigation ensued between him and the vendor. In August, 1902, a judgment creditor of the purchaser obtained an order appointing himself, upon giving security, receiver of the rents, &c., receivable in respect of the purchaser's interest in the land under the contract for sale. Notice of this order was at once served on the vendor, and the order was registered under

VENDOR AND PURCHASER—*continued.*

the Land Charges Registration and Searches Act, 1888, and the Land Charges Act, 1900, but the creditor did not perfect his security as receiver until May, 1903. Meanwhile, in January, 1903, the litigation between the purchaser and the vendor was compromised, a consent order being made for the rescission of the contract of sale and the delivery up of possession of the property by the purchaser on payment of 110*l.* to him by the vendor.

In May, 1903, the judgment creditor commenced an action against the vendor claiming a declaration that by virtue of the receivership order he was entitled to a lien or charge on the property for securing payment of the judgment debt and costs, with interest, and claiming also payment of the judgment debt and costs by the defendant:—

Held, that the 110*l.* was not paid to the purchaser as the price of any interest which he had in the land, but on the basis that he had no interest, and only for the purpose of getting him out of possession:

Held, therefore, that the judgment creditor had no claim against the vendor, and that the action must be dismissed.

Decision of Farwell J., [1904] 1 Ch. 658, affirmed. RIDOUT *v.* FOWLER - C. A. 93

3. —— *Specific Performance — Statute of Frauds—Part Performance.*

The defendant entered into a verbal contract with the plaintiffs for the purchase from them of a plot of land with a house upon it, which they were to build for her. During the progress of the building she frequently visited the site, and made suggestions for material alterations and improvements which were carried out by the plaintiffs at her request. In an action for specific performance of the contract she relied on the Statute of Frauds as a defence:—

Held, that the acts done by the plaintiffs at the request of the defendant were acts of part performance taking the case out of the Statute of Frauds, and that the plaintiffs were entitled to judgment for specific performance.

Dictum in *Caton* v. *Caton*, (1866) L. R. 1 Ch. 137, considered. DICKINSON *v.* BARROW
Kekewich J. 339

—— Outgoings—Paving expenses—"Completion of works" - - - - 226
See STREETS. 2.

—— Sale of goods.
See under SALE OF GOODS.

VESTING — School board — Appointed day — Transfer of property—Vesting—Consols
See LOCAL GOVERNMENT. 2. 716

VESTING ORDER — Company — Winding-up—Contract to sell assets—Letters patent —Omission to assign before dissolution —Registration - - - 737
See COMPANY. 14.

—— Option to take or be excluded — Lease—Disclaimer — Mortgagees by demise—County court—Jurisdiction - 57
See BANKRUPTCY.

WASTING PROPERTY—Interest, Rate of—Mining royalties—Income of invested surplus - - - - 4
See SETTLED LAND. 5.

WILL—*Alteration of Words*—"*Of*" *read for* "*or*"—*Real Estate*—*Strict Settlement*—*Bequest of Heirlooms to devolve with Real Estate*—*Defeasance Clause*—*Gift over*—*Construction of Will.*

Testator devised his mansion-house and real estate in strict settlement, and then bequeathed certain heirlooms to trustees upon trust to permit the same from time to time to go and be held and enjoyed with the mansion-house, so far as the rules of law and equity would permit, by the person or persons who for the time being should be entitled to the possession of the said mansion-house by virtue of his will, "yet so that the said chattels shall not vest absolutely in a son or any person hereby made tenant for life of the said mansion-house unless such son or other person shall attain the age of twenty-one years":—

Held, that the word "or" must be read "of," and that the heirlooms did not vest absolutely in the first tenant in tail under the limitations, who had died an infant:

Held, further, that the heirlooms, being thus taken away by the proviso from the first tenant in tail, did not fall into the residuary bequest of personalty, but were carried over to the next person entitled to the real estate under the limitations until a tenant in tail by purchase was reached who attained twenty-one. *In re* DAYRELL. HASTIE *v.* DAYRELL **Joyce J. 496**

2. —— *Ambiguity*—*Explanation by reference to Recital in Codicil*—*Gift to a Class*—*Lapse*—*Construction of Will.*

In construing a will containing an ambiguity the Court may, for the purpose of explanation, refer to a recital in a codicil, unless it be obviously erroneous.

Darley v. *Martin*, (1853) 13 C. B. 683, and *Grover* v. *Raper*, (1856) 5 W. R. 134, followed.

Testatrix by her will gave all her property upon trust for her niece for life, and after her death to divide the same equally between the brothers and sisters of the said niece living at her decease, and A., B., and C. in equal shares, and should either be dead leaving children, such children are to take the share their deceased parent would have been entitled to if living."

By a codicil the testatrix recited that by her will she had directed her estate to be divided between the persons therein named, and declared that she desired a certain great-niece to have a share equally with the others named in the will, and bequeathed the same to her accordingly.

A. and B. stood in the same degree of relationship to the testatrix, but C. was a stranger in blood.

A. predeceased both the testatrix and the tenant for life.

B. survived the testatrix, but predeceased the tenant for life:—

Held, (1) interpreting the will by the recital in the codicil, that the estate went, not in moieties between the brothers and sisters of the tenant for life on the one hand, and the named persons on the other, but equally between them all;

WILL—*continued.*

(2) that the gift to A., B., and C. was not contingent upon their surviving the tenant for life, and that consequently B.'s representatives were entitled to his share; (3) and that the gift was not to a class, and that therefore A.'s share lapsed to the next of kin of the testatrix. *In re* VENN. LINDON *v.* INGRAM - - - **Joyce J. 52**

3. —— *Forfeiture*—*Charitable Legacy*—*School*—*Endowment*—*Trust Deed*—*Gift over to Residue*—*Perpetuities*—*Construction of Will*—*Education Act*, 1902 (2 *Edw.* 7, *c.* 42), *ss.* 11, 13.

By her will made in 1891 Mrs. Blunt gave to trustees such a sum as would produce 20*l.* a year, and directed them to pay that income to the treasurer for the time being of the Bicknor National Schools for the support of the schools so long as they should be carried on under the conditions contained in the trust deed of the schools, and the funds necessary for carrying them on should be supplied by voluntary contributions. The testatrix declared that this gift should be void if any of the three following events should happen in her lifetime, namely: (1) if a school board for the parish should be formed; (2) if the funds necessary for carrying on the schools should be raised under powers contained in any Act of Parliament; (3) if a trust should be created and a sufficient fund set apart for carrying on the schools under the deed of trust. She further declared that if either of the two first-mentioned events should happen after her death, then that the payment of the annuity was to cease and the fund purchased to produce the same was to fall into her residuary estate.

The testatrix died in 1900. None of the events mentioned happened in her lifetime. On January 8, 1904, the Board of Education issued a final order under s. 11 of the Education Act, 1902, for the appointment of foundation managers of the school. The result was that the school could no longer be carried on under the provisions of the trust deed:—

Held, that the school was no longer carried on under the conditions contained in the trust deed, and, therefore, that the annuity had come to an end; the second condition had been satisfied, so the annuity had ceased under that also; the annuity fund, therefore, fell into the residue by operation of law, and it was unnecessary to consider whether the gift over to the residue was void as an infringement of the rule against perpetuities. *In re* BLUNT'S TRUSTS. WIGAN *v.* CLINCH - - - - **Buckley J. 767**

4. —— *Lapse*—*Gift with Intention of discharging Obligation*—*Death of Legatee.*

Where on the true construction of a will the Court finds that the testator's intention in giving a legacy was not merely bounty to the legatee, but to discharge a moral obligation recognised by the testator, whether legally enforceable or not, the legacy will not lapse by the legatee's death in the testator's lifetime. STEVENS *v.* KING - - - - **Farwell J. 30**

5. —— *Remoteness*—*Contingent Remainder or Executory Devise*—*Construction of Will.*

A testator devised freehold estates to uses in strict settlement.

WILL—*continued.*

By a codicil the testator directed that no devisee of any of his real estates devised under or by virtue of his will should have a vested interest therein or in any part thereof, or be entitled to the possession of the same or any part thereof, until the attainment of the age of twenty-four years, anything contained in his will or any law or usage to the contrary notwithstanding:—

Held, that the effect of the codicil was to make the limitations of the will executory devises, and consequently that they were void for remoteness and there was an intestacy.

Decision of Farwell J. affirmed.

In re Lechmere and Lloyd, (1881) 18 Ch. D. 524, *Miles* v. *Jarvis*, (1883) 24 Ch. D. 633, and *Dean* v. *Dean*, [1891] 3 Ch. 150, approved and followed.

Russel v. *Buchanan*, (1836) 7 Sim. 628; 2 Cr. & M. 561; 40 R. R. 193, distinguished. *In re* WRIGHTSON. BATTIE-WRIGHTSON *v.* THOMAS **C. A. 95**

6. —— *Settlement Estate Duty—Direction to pay "my Duties" out of Residue—Estate Duty—Will—Construction—Specific Devise by way of Settlement.*

A testator, who died in 1903, after making pecuniary bequests and devising certain freeholds upon trusts by way of settlement, devised and bequeathed the residue of his real and personal estate upon trust for sale and conversion, and directed his debts, funeral and testamentary expenses and duties to be paid out of the proceeds of such sale and conversion:—

Held, that the settlement estate duty as well as the estate duty payable in respect of the specifically devised realty must be paid out of the general residuary estate in exoneration of the specifically devised realty. *In re* PIMM. SHARPE *v.* HODGSON - - **Farwell J. 345**

WILL—*continued.*

—— Settled land.
See under SETTLED LAND.

—— Uncertainty, Gift for "charitable and benevolent institutions" not void for
See CHARITY. 3. **354**

WINDING-UP—Benefit society.
See under BENEFIT SOCIETY.

—— Company.
See under COMPANY.

WORDS—"Amalgamation" - - **268**
See COMPANY. 10.

—— "Completion of works" - - **226**
See STREETS. 2.

—— "my Duties" out of residue - - **345**
See WILL.

—— "Knowingly issuing" - - **631, 732**
See COMPANY. 8, 9.

—— "Party interested" - - - **363**
See PRACTICE. 2.

—— "Reconstruction" - - - **268**
See COMPANY. 10.

—— "in the character of Trustee" - **328**
See LUNACY.

BIBL. LONDIN UNIV.

LONDON:
PRINTED BY WILLIAM CLOWES AND SONS, LIMITED,
DUKE STREET, STAMFORD STREET, S.E., AND GREAT WINDMILL STREET, W.